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RIPIARIAN AND LITTORAL RIGHTS.

We gave in a former article, vol. XXI., p. 1, under the head of Flats and Alluvion, a translation from Denisart, of the title "Atterrissement."

Some of the doctrines involved in that article are more fully discussed and their application extended in the case of *Bates v. Illinois Central Railroad Co.*,* where the legal rights of riparian owners, and the effects of accretion and decrection upon those rights came before the court, and has, we understand, been carried to the Supreme Court of the United States, upon exceptions. The case presents a question of great interest, both as to the principles of law governing the rights of the owners of land bordering upon inland navigable lakes, and the application of those principles to a somewhat novel and peculiar state of facts.

The common law principles, applicable to the ordinary accretions and diminutions of land bordering on water courses, sometimes called alluvial rights, have been much discussed in the courts, and are now pretty well developed and settled, both in this country and England.

But in order to determine the rights of owners of land bordering upon a sea or lake, much advantage may be derived from the continental and civil law.

And Mr. Wills, in his very ingenious, learned and able

* Report of the evidence in the case of *George C. Bates v. Illinois Central R. R. Co.* In the United States Circuit Court for the Northern District of Illinois. Hon. John McLean, Presiding Judge; Hon. Thomas Drummond, Associate Judge. October Term. *George C. Bates v. Illinois Central R. R. Co.*, Ejectment; Messrs. N. C. McLean, E. C. Larned, J. A. Wills, T. Hoyne, S. A. Goodwin, for Plaintiff; Messrs. James F. Joy, J. M. Douglas, D. Stuart, C. Beckwith, for Defendants. R. R. Hitt, Reporter. Chicago, 1859. 8vo, pp. 263. Argument of J. A. Wills, of Counsel for Plaintiff. Detroit, 1859. 8vo, pp. 77.

argument for the plaintiff in this case, has shown how their principles, precedents and analogies, when carefully studied, may be made to reflect a "gladsome light" upon one of the obscure and difficult problems of a rival science. This especially appears in the citations from Grotius, who wrote in a country where for ages a war of elements has been waged between sea and land, and where, by the indomitable industry and perseverance of the Hollanders, the gains of land from sea and ocean, have long been the subject of municipal regulation and adjudication.

History informs us that the periodical floods of the Nile, which obliterated all boundary lines of the lands made fertile and valuable by these submersions, developed the science of geometry to determine the rights of the owners of the soil. And the necessity of a principal meridian or base line from which to begin their measures, may also have fostered the cultivation of astronomy. We have no reports of decisions on Nilean land titles; but if history is correct, in regard to the determination of boundary lines, by geometrical rules, each owner had the right to claim his precise *locus* or *situs* upon its emersion from the receding river floods. Yet if the Nile, upon the subsidence of its waters, always resumed the same channel, leaving its banks precisely as they were before the overflow, even Egyptian wisdom and learning would aid but little in settling modern alluvial and riparian questions and problems.

In some parts of this country, where, as at Chicago, a single generation sees a few scattered cabins replaced by the palatial warehouses and dwellings of a city, numbering more inhabitants than the entire population of some of the older States, a young and growing city extends itself over what was formerly flats or swamps, and into mill ponds and lakes; and titles to outlying and neglected lots become the source of much litigation, from the fact that when the original grants were made, they were of so little value that no careful surveys or plans were made, or that the first owners considered it unimportant whether their boundary lines extended a few rods or furlongs more or less into a bog or along a beach or sand-bar.

In the case of *Bates v. Illinois C. R. R.*, the controversy arose as to the title to land which was once a sand-bar or sand-spit, extending from the westerly shore into Lake Michigan, near the mouth of the Chicago river, which sand

bar was washed away, and the lake extended over it; and subsequently the lake was filled up from the shore far enough to include the bed or *situs* of the old sand-bar or spit.*

The causes and circumstances of the disappearance of the sand-bar are sufficiently stated in the following extract from the deposition of Hon. S. A. Douglas, and in the charge of Judge Drummond to the jury, hereafter given :

"I know the situation of the property alluded to. I am familiar with the early maps of the city, by which it appears that originally the mouth of the Chicago river was some distance south of the present piers, and the narrow strip of land separating the river from the lake, was by the old settlers called the 'sand-bar.' I never saw the sand-bar until after the piers had been constructed by the government, by which it was separated from the north shore and the old bed of the river filled up, and a large portion of the sand-bar washed away by the action of the water, consequent upon the construction of the piers and the correspondent change of the channel of the river."—*Rep. p. 63.*

We give a part of the instructions asked for by the plaintiff's counsel:

"II. That the construction by the United States of the artificial channel, or harbor, across this tongue of land, known as the Sand-bar, could, in no manner, legally change or affect the legal boundaries of the fractional section of which it formed a part, and that by the diversion and closing of the old channel of the Chicago river, Henry Moore, by virtue of his riparian rights, took to the centre of the old

*Extract from the testimony of J. D. Graham, Superintending Engineer of Harbors on Lake Michigan.—We make a difference, professionally, between sand-spit and sand-bar. A sand-spit is above water, and a bar is under water. There is not a doubt in my mind that the protrusion of the United States piers caused the washing away of the sand-spit. It is well known that there is what we call a littoral current—that is, a current abrading the shore, coming from the north, and running to the south, which is caused, we believe, by the greater prevalence of the north-easterly winds, pressing the waters from the east upon the western shore, in such a manner that they strike it at an angle of about forty-five degrees, causing the water to run in a southerly direction along the coast, in an habitual current, that never ceases, as far my experience goes, unless checked by some obstacle, as a temporary wind blowing in the reverse direction. Then its velocity is retarded by this temporary reverse influence. This current, abrading the sandy shore of the lake, will, of course, carry away a portion of the material composing the shore, which is a light sandy material that we call silt. This silt, being held in suspension, by a well known law, that what is held in mechanical suspension in a current, will be precipitated by the slackening of that current, is deposited wherever the current is retarded. I have no doubt, myself, that the sand-bar was created originally—how far back, it would be very difficult to speculate upon—by this same cause; that is, by the silt wafted by the littoral current and meeting the river. There is, then, a composition of forces, and the bar takes a direction diagonal to these two forces. The exact direction of that diagonal depends on the relation of the two forces. The diagonal will conform to that force which is the stronger, rather than to the weaker one. The littoral current here was generally the stronger, and was habitual; therefore the bar took that direction.

channel on the west, and was invested with all the ordinary rights and privileges of a riparian owner, on the shore of the lake.

VIII. That a grant of land includes not only the *surface* of the earth, but *everything under or over it*, and that a simple removal of *soil or surface* cannot change the title to the *remainder*; and if the jury believe from the evidence adduced, that the plaintiff had a legal title to the tongue of land, then the destruction of the *surface* by the overflow of the lake, in no manner affected the plaintiff's title to the *substratum* or *situs*, whether such overflow was *gradual and imperceptible*, or *sudden and violent*.

IX. That by the common law, an absolute title to real estate can never be lost by simple *abandonment* or *non-user*, for any period of time, however long. That to produce this effect, it must be accompanied by such adverse occupancy as will give title under the statute of limitations, and then the title is derived from *adverse occupancy*, and not *abandonment*. That water in itself is not an adverse occupant, and that the exercise of the right of navigation over submerged land is simply a *license*, and confers no title to land—17 Howard U. S. Rep., *Boston v. Lecraw*.

XII. That if the jury shall find, from the evidence adduced, that the overflow or washing away of the surface of the tongue of land known as the sand-bar, was caused by *artificial agencies*, to wit: the *construction of the piers*, thereby giving new direction to the natural forces of the elements, then the title of the plaintiff to the *substratum* or *foundation* was *not lost*, or changed in any manner, whether such overflow was *gradual and imperceptible*, or *sudden and perceptible*."

Also, we give the second and third of those asked for by the defendant's counsel:

"II. That if the sand-bar were washed away and re-formed in that manner—or if in any way, it was a part of the north fraction of section ten (10,) which became the property of the grantors of the plaintiff, yet if afterward, by the gradual and imperceptible wearing away by the action of the waters of the lake, it was worn or carried off, and the place where it had been became a part of the bed of Lake Michigan, and an open roadstead for boats, rafts, and vessels to pass and re-pass and ride at anchor, and so remained for a period of years, and until it came into the possession the defendants, *then* the title of those under whom the

plaintiff claims, was lost and ceased to exist, and he can have no right to recover in this action.

III. That if the said sand-bar was carried away by sudden avulsion in part, and in part by the gradual and imperceptible action of the waters, then it is the duty of the plaintiff to show *what part* was so suddenly carried away, and *what part* was carried away, gradually and imperceptibly, and that his right to reclaim, can extend only so far, as it appears to the satisfaction of the jury, that it was suddenly carried away—and to the portion or part or tract of land so carried away, and no further—and that if such part cannot be distinguished and marked out, then there can be no recovery in this action by the plaintiff."

JUDGE DRUMMOND'S CHARGE TO THE JURY.

This is an action of ejectment, and the point to be determined is, whether the plaintiff has made out a title to the land in controversy. He claims through Robert A. Kinzie. Kinzie claimed the north fraction of section 10, town 39 north, range 14 east, under the pre-emption law of 29th of May, 1830. The land was north of the Chicago river, and had Lake Michigan on the east. Kinzie proved up his pre-emption, at the land office in Palestine, in May, 1831, and paid the purchase money; but Congress had, prior to that time, divided the land district; and in May, 1831, Palestine was not the proper land office to prove up the pre-emption. The act of Kinzie and of the land-officers at Palestine was, therefore, illegal, and their certificate of entry gave no title to Kenzie. He, however, from that time treated the land as his own, and in February, 1833, he laid a portion of it off into town lots, and, as is insisted by the plaintiff, that part in controversy in this case.

By the act of Congress, of July 1, 1836, entries of the character of Kinzie's were confirmed, and patents were to be issued therefor as in other cases. A patent accordingly issued to Kinzie, on the 9th of March, 1837. There can be no reasonable doubt, I think, that this title, thus perfected, related back to the entry of Kinzie, in May, 1831, and the law gave it effect from that date, precisely as if it had been made in the proper land office.

The land had been surveyed in 1821, and on the plat of the government survey, the north fraction of section 10 is represented as having the Chicago river on the south, and

Lake Michigan on the east. The river is represented as flowing out in nearly a straight line into the lake. The fact seems to be, that from 1816 to 1821, the river, instead of flowing out, as represented on the survey, just before it entered the lake, made a sharp curve to the south, and thereby formed a sand-bar, or spit of land, between it and the lake, which has given rise to this controversy. This sand-bar existed in 1821, but it is not noticed in the plat of the survey. In 1821, the river seems to have run into the lake, according to the plat, but it is said this was in consequence of an artificial channel cut through the sand-bar. This channel was stopped up in the winter of 1821-2, but was opened again in the spring of 1822, by a freshet, and water continued to flow out there in the summer of 1822; but during 1821 and 1822, more or less water passed from what had been the mouth prior to 1821. After 1822, the direct channel was stopped up, and, with an occasional exception, caused by the act of man, or by a freshet, the river flowed into the lake up to 1833, in its original and natural bed. In 1833 and in 1834, the government constructed piers across the sand-bar, and the river from that time has flowed through those piers, the old channel south of the pier having ceased to bear the water to the lake, because the south pier was run across it, as well as across the sand-bar. In the construction of the piers, the government of the United States did not purchase or condemn the land; but Kinzie seems to have acquiesced in the act, and, indeed, as already stated, it was not till 1836 that Kinzie's title was confirmed.

Under this state of facts, the substantial truth of which is not denied, the land of Kinzie, covered by his entry and purchase, would be the tract within the following boundaries, as they existed at the time of the entry, (there being no question made but that the government plats, by which sales were made, show that the whole land north of the river, and south of the north line of the fraction, was sold as one parcel,) the north line and west line of fractional section 10, according to the public survey, and the Chicago river and Lake Michigan, as they then existed. That is, it would include all the dry, firm land there was at that time, between the west line of the section and the lake, and the north line of the section and the river. The river, the lake, and the two lines of the fractional section 10, constituted

the boundaries. Whether the land in controversy was within these boundaries, is a fact to be found by the jury, depending upon the evidence before them.

As has been stated, Kinzie acquiesced in the construction of the piers, and if so, the jury, after the lapse of so many years, may presume a dedication of the channel of the river thus formed, the piers and whatever was necessary to accomplish the object of their construction, to the use of the public. This, as I understand, is conceded by the counsel of the plaintiff.

At the time the piers were constructed, the sand-bar extended for some distance from the south pier, in a southerly direction, and east of the old bed of the river. Immediately after the piers were put down, land began to form and increase, by the action of the water, on the north side of the piers; and the sand-bar, south of the piers, also began to wear away, until it almost entirely disappeared beneath the waters; and the lake, extending over the sand-bar and old bed of the river, began to encroach on the main bank. The witnesses do not all agree as to the time it took to accomplish this, but the general statement is, somewhere about 1838 or 1839.

If the sand-bar south of the piers was included within, and formed a portion of the land purchased of the government by Kinzie, then the construction of the harbor did not divest Kinzie or his grantees of the title, without their consent or acquiescence; and if the old bed of the river ceased to be used as a public highway, and became dry land, then the riparian owners would hold to the centre of the river, upon the principle of alluvion.

The general rule, as to the rights of property bounded on a great body of water like Lake Michigan, is, that he who owns on the lake goes to low-water mark. The evidence in this case shows that the lake rises and falls several feet, and that land, at one time overflowed, is at other times, and for a series of years, left bare. The reason of the thing would therefore seem to be, that the owner's title would extend to the water. The bed of the lake, covered by water, belongs to the public, or to the government. The ownership, or absolute title to land implies, not only the right to the surface of the tract, but the substratum, and includes, of course, all that is beneath the surface, as mines or other things.

But the fact that land is bounded or washed by a great body of water, like Lake Michigan, gives rise to rules and principles in the law of real property, which are peculiar to such a condition of things. It has been settled for ages, in the law of all civilized nations, that, unlike an ordinary case, the boundary of a man's land so situated may change; that from necessity and natural equity and justice, his title may be most materially affected by the action of the water. If the law is, that the boundary of the riparian owner extends to the water, then there is always a line which is a common boundary to the private owner, on the one side, and the public on the other, and it is manifest, if this water line varies, the boundary may also vary. The shore proprietor takes the chances of his position—the advantages and the risks. Among the former is the possibility of his land being increased by alluvion; among the latter, of being diminished by decretions—each caused by the action of the water. If accretions are gradually formed upon the lake shore, the owner acquires them, and not only the surface deposited by the water, but he becomes the absolute owner of the substratum, the land or soil, mines, or whatsoever else there may be, beneath the particles deposited by the water. If, on the other hand, the water gradually and imperceptibly encroaches upon his land and wears it away, and thus masters what was once dry land, and it becomes the bed of the lake, then the owner not only loses the surface of the soil, but his title ceases to what has now become the resting-place of the waters of the lake. If this is not so, what is the meaning of all the authorities, including that of the Supreme Court of the United States, when they declare, that as the riparian proprietor is subject to *loss*, he shall have the *gain* of alluvion? How can he be subject to loss, except of title to his land? It is impossible to suppose that they mean merely the loss of the few particles of superstratum, which are removed by the water.

The principle, however, as I understand it, proceeds upon the ground of acquiescence in the owner, whether public or private. I suppose if the water is gradually filling up, by its action, a harbor or great public highway, the government has the right to remove, from time to time, the deposits, which threaten to impair its usefulness; and so the private owner may resist and oppose, by every means in his power, the encroachments of the water upon his land, how-

ever gradual they may be; and yet, in either case, if there is an acquiescence for a long time, say for a series of years, in the results brought about by these natural causes, the public, in the one case, loses the title to what was once the bed of the lake, and the private person, in the other, to what was once firm, dry land, and of which he had been the absolute owner. It is not more unreasonable or unphilosophical, that a title to land should be washed *off* by the action of the water, than that it should be washed *on* by the same operating cause.

These being my views of the law of this part of the case, it remains to make an application of it. The placing the piers there did not, in my opinion, change the principles of law which have been stated. The riparian owners still took their chances of increase or diminution. The effect or consequence of the construction of the piers was, that land was formed on the north and worn away on the south side; but being there, natural causes, modified or affected, it may be, by them, brought about the results which we now know. It follows from what I have said, that if the gain on the north and the loss on the south side were caused gradually and imperceptibly by the action of the water, my opinion is, that in the one case the owner acquired, in the other lost, title to land, if there has been an acquiescence for a series of years, by the public in the gain, and by the private owner in the loss.

It is, then, a matter of fact, which I shall leave to the jury—if they find that Kinzie was the owner of this sand-bar—whether it was washed away gradually by the action of the water, and if so, to what extent; if they find from the evidence, that this bar was washed away gradually and imperceptibly by the water of the lake, and that what was the sand-bar became the bed of the open lake, and so continued for a series of years; that the owners of it did not resist the action of the water, but permitted it to remain for seven years, and more, an open roadstead, then I think that the title to that portion of the sand-bar, so washed away, and so covered with water, had become vested in the public, and that the plaintiff cannot recover such portion, in this action, under the conceded facts in the case. If, however, you should find it was not so washed away, and so continued, then the plaintiff may recover.

If you should find that a portion of the sand-bar was not

washed away at all, then of course, this principle would not apply, but it would depend entirely upon the fact whether the plaintiff has shown title to such portion.

It is necessary, in order to avoid misapprehension, that an explanation should be made of the terms *gradual and imperceptible*, as used in these instructions. A gradual and imperceptible washing away means that change, which was going on, on the shore of the lake, and which could not, at any particular time, be seen or measured. The meaning is not, that a change cannot be noticed between different intervals of time, but it cannot be seen *as it occurs*. It was not necessary, in order to be gradual and imperceptible, that there should always be the same degree of change in the same time. Some of the authorities say, that it means the change which cannot be observed at any one moment of time.

It would seem to be a sound principle, that if the plaintiff has shown title to the sand-bar in Kinzie and his grantees, through whom he claims, it devolves upon the defendants to make out the title to be gone, if they rely simply upon its submersion by the lake.

As I think the point—whether the sand-bar was carried away gradually and imperceptibly by the action of the water or not—as it may be found by the jury, must substantially rule the material matters in dispute in this case, it is perhaps unnecessary to advert to some other questions which are referred to in the instructions asked on both sides.

As I understand, upon the proof before the jury, the plaintiff has whatever title to the sand-bar Kinzie had, (if any,) or his grantees. I would ask the defendants' counsel whether they make any point on that?

Mr. JOY.—We make no point on that, your Honor.

JUDGE DRUMMOND.—There can be no doubt, if the jury believe the evidence, that the defendants had notice, as well constructive by the records as actual by information to them, of the claim of Kinzie and his grantees, before they (the defendants) took possession.

So that the case turns mainly upon the points—

First.—Had Kinzie a title to the sand-bar?

Second.—Has that title, if it ever existed in him or his assignees or grantees, been lost by the gradual and imperceptible action of the lake; and if so, how much and to what extent.

There seems to be no reasonable doubt, under the evidence, of the position of the sand-bar.

Neither does there seem to be any doubt, that if the grant of the government to Kinzie, covered the sand-bar, and his title passed to his assignees, and so to the plaintiff, that the deeds introduced by the defendants from the Secretary of War, and from the owners of the Fort Dearborn Addition lots, could not convey any land claimed by the plaintiff in this case.

These are all the instructions, gentlemen, that the court deems it necessary to give you upon the law of this case—with this caution to you: that you are to find your verdict exclusively upon the law and upon the *facts* that are introduced in evidence before you. It is your imperative duty to disregard all outside influences and considerations. This case and this verdict should be determined by the law and by the evidence, and by them *alone*.

JUDGE MCLEAN.—I acquiesce in the charge of my brother judge, though we differed on one or two points, as to the law of the case.—*Rep.*, pp. 255-262.

JUDGE DRUMMOND.—The court has refused to give any of the instructions asked by either party, and has given its own instructions to the jury, deeming those instructions all that are necessary in the case.

The jury returned a verdict in favor of the defendants.

Mr. Justice McLean is understood to have differed from his associate substantially, but to have waived his objection for the purposes of the trial; the whole case being open to revision in the Supreme Court. His view, if we rightly apprehend it, was, that the doctrine of insensible diminution did not apply to the case of a lake shore, but was confined to rivers; and that the owner upon the borders of a lake may reclaim his land at any time after its submerision, by filling up again, and thus restoring the surface.

EXCHANGE IN ANCIENT GREECE.

Extract from a work nearly ready for the press, entitled: "The Judicial System and Procedure of the Athenians, by M. H. E. Meier and G. F. Schömann; to which is added the Courts of Arbitration in Ancient Greece between Sovereign States, with an Appendix containing a Greek inscription and notes on the same, by M. H. E. Meier. Translated from the German by A. Lamb." (The extract taken is from a note by the translator.)

The passage of Isocrates, Trapeziticus, § 19, is the only one adduced from the classical Greek authors, by writers on Jurisprudence,* and the history of commerce, to show that there is a trace of the use of bills of exchange by the ancient Greeks. We will give a translation of so much of the passage as is necessary to present a complete view of the transaction to which reference is therein had, together with a few comments upon the same. We translate as follows:

"For O, judges, Stratocles being about to make a voyage to the Pontus," (that is, to the kingdom of Bosphorus, on the north coast of the Euxine Sea,) "I, wishing to have a very large sum of money thence remitted to me, requested Stratocles to leave his money with me, and to receive in return the same amount from my father in the Pontus," (that is, in the kingdom aforesaid,) "thinking that it would be a great advantage to me to make this arrangement; since in that case I should not incur the risk of losing my money at sea; especially as the maritime supremacy was at that time possessed by the Lacedæmonians. . . . Stratocles inquiring who would return him the money if my father should not comply with my directions, or if he himself upon his return voyage, should not find me here, I introduced (*συνέστησα*) Pasion to him, and Pasion promised to return him the principal, together with the interest."

Upon this, the desired arrangement seems to have been made, and Pasion to have become the surety (*ἐγγυητής*) for the repayment of the money advanced by Stratocles to the person who is represented to have delivered the speech.

* See 3 Kent's Comm., Sect. 44. p. 88, n. c. 9th ed.

This person, whose name has not been transmitted to us, was the son of Sopæus, who was a favorite of Satyrus, king of Bosphorus, — the present Crimæa and the adjacent country,* — and was entrusted by the latter with the government of a large district in this kingdom, and with the command of all his military forces.† Satyrus reigned from B. C. 407 or 406 to B. C. 393 or 392.‡ The transaction mentioned in the passage translated seems to have been managed by something similar to our bill of exchange; but it seems from the manner in which it is related, to have been rather an exceptional transaction, and not in the ordinary course of business. And, indeed, our surprise at finding so few traces of anything like bills of exchange in ancient Greek authors of the classic era, will be at least very much diminished, if not entirely removed, when we consider how little confidence there was, and how little reason there was for confidence, in ancient Greece in relation to matters of business; “the failure of moral principle, the imperfection of the political constitutions, and of the civil law, and particularly the difficulty of prosecuting one’s right in a foreign State. Their courts were ill constituted, and all sorts of evasions and fraudulent artifices could be practised by a knavish debtor. Dishonesty seems to have been the rule and honesty the exception.” Such is the testimony of Polybius and of others of the most reliable ancient historians.§

Besides, with regard to Athens in particular, the Athenian money was not only everywhere current, but was in foreign States at a premium, and was therefore exchanged to advantage; and the custom of loaning money on contracts of bottomry and respondentia upon the security of a ship or its cargo, or a portion of the latter, at a high rate of maritime interest, enabled a merchant or other lender, to transfer for his own use, or to his correspondent in a foreign state, or to any other person with whom he should have made an arrangement for the purpose, his funds, with a fair prospect of making a profit by the transaction; for when the loan was made for a single — that is, for either

* See Smith’s Dict. of Gr. and Rom. Geogr., Art. Bosphorus Cimmerius, and Dict. of Gr. and Rom. Biogr. etc., Art. Satyrus.

† See Isocr. l. c. § 3.

‡ See Smith’s Dict. of Gr. and Rom. Biogr. etc. l. c.

§ See Böckh’s Pub. Econ., Vol. 1, pp. 176 seq. 272 seq. 2d ed. Lamb’s Tr., pp. 175, 269 seq.

the outward or the homeward — voyage, the principal and interest were to be paid at the place of destination, either to the creditor, if he went with the vessel, or to an agent, or to some other person authorized to receive it.*

Prof. Bockh† asserts that the ancient Greeks had no system of exchange for transferring funds from one country or place to another, and that consequently transfers were generally made by exporting gold coin; and this seems to be the correct view of the subject.

Upon comparing what is here stated with the note above cited from Kent's Comm., it will be perceived that in the latter are contained the following errors; which, although of no importance with reference to the subject to which the note relates, yet it would be well, for the sake of scholarly accuracy in a work of that standard authority, to correct, namely:

1. Sopæus is in the note said to have been "the governor of a province of Pontus." One would understand from this the country Pontus in Asia Minor; but Sopæus was the governor of a district in the kingdom of Bosphorus.

2. Stratocles is said to have been "about to sail from Athens to Pontus." The statement in the speech of Isocrates is that he was about to sail "εἰς τὸν Πόντον;" that is, to that part of the coast of the Euxine Sea which comprised the kingdom of Bosphorus.

3. "The young man" himself, not "the orator," as is stated in the note, is represented to have said, that "this was deemed" [by himself,] "a great advantage."

4. The clause "over a sea covered with Lacedæmonian pirates," is erroneous. It was not "pirates" of whom the speaker was apprehensive, but the public ships and privateers of the Lacedæmonians; who, he says, at that time held the supremacy at sea. This we find by referring to the Grecian history, was the case during nearly the whole of the reign of Satyrus in the kingdom of Bosphorus; and the Peloponnesian war was at the same time raging.

5. In the last two lines of the note Sopæus is called "the governor of Pontus," and his son, "the young Pontian;" whereas, as said before, the former was the governor of a district in the kingdom of Bosphorus, and the latter an inhabitant of the same kingdom and a subject of its king.‡

* See Bockh, l. c., p. 187; Lamb's Tr., p. 185.

† L. c., pp. 44, 67; Lamb's Tr., pp. 45, 67.

‡ C.f., in confirmation, the authorities already cited, and also those cited at the end of this article.

The same error with regard to the term Pontus is found in C. R. Kennedy's Translation of the speeches of Demosthenes, ag. Aphobus, ag. Phanus, and ag. Onetor, Preface, p. 30; where the son of this Sopæus, the plaintiff in the action to which the speech of Isocrates cited relates, is said to have been "a merchant from Pontus," instead of "from the kingdom of Bosporus," and Satyrus is said to have been the sovereign of "Pontus," instead of "the kingdom of Bosporus." The phrases *εἰς τὸν Πόντον*, and *ἐκ τοῦ Πόντου*, in the speech of Isocrates, have reference to a particular part of the coast of the Euxine Sea; namely, to that part of it which comprised the kingdom of Bosporus.

In Watson's translation of Xenophon's Hellenics, or Grecian History, Vol. 1, 28, p. 436, Bohn's ed., the phrase *ἐκ τοῦ Πόντου* is translated "from Pontus;" it should be "from the Euxine Sea." *

The denomination Pontus applied to the country, subsequently so called, in Asia Minor, was not known to Isocrates, Xenophon, and the contemporary authors; and it was not until after the death of Alexander the Great that this country, by this name, made any figure in history; for although it is stated by Dr. Leonard Schmitz, in his article Pontus, in Smith's Dict. Gr. and Rom. Geogr., that "Xenophon is the first ancient author who uses Pontus as the name of the country," — that is, the country mentioned, in Asia Minor, — we are confident, that, if the reader will turn to the only passage to which the learned Doctor refers,† and will peruse in connection with it the last two chapters of the fourth book, and the first six chapters of the fifth book of the work cited, he will come to the conclusion that Xenophon uses the phrase *ἐν τῷ Πόντῳ* in the said passage, in the signification "on the coast of the Euxine Sea." ‡ After the term Pontus came to be applied to the country, so called, in Asia Minor, it was not usual to prefix the article before it when used in that sense.§

* See Grote's Hist. of Gr., Vol. ix., p. 534, 4th ed.; Thirlwall's Hist. of Gr., Vol. iv., p. 476, London, 1845-1855.

† Xen. Anab. Vol. 6, § 15.

‡ Cf. Grote, l. c. p. 179; Thirlwall, l. c. p. 369; Anthon's Class. Dict., Art. Pontus; and Böckh, l. c. p. 126, n. a. Lamb's Tr. p. 124, n. 1.

§ See the Greek authors after the time of Alexander the Great, *passim*.

[From the *Law Times*.]

LORD MACAULAY.

Died Dec. 28th, at his residence, Holly-lodge, Campden-hill, Kensington, in the 59th year of his age, the Right Hon. Thomas Babington, Lord Macaulay, of Rothley Temple, in the county of Leicester.

Such are the few brief words in which the daily papers announce the departure from amongst us of one of the great literary lights of the nineteenth century. As Lord Macaulay was a barrister-at-law, we may be pardoned for placing on record in the *Law Times* a short memoir of his career.

Thomas Babington Macaulay was the son of the late Mr. Zachary Macaulay, well known for his exertions in company with Clarkson and Wilberforce in the cause of the abolition of the slave trade. His mother was Miss Selina Mills, the daughter, we believe, of a bookseller at Bristol. He was born at Rothley Temple, Leicestershire, in 1800. The distinguished historian graduated in due course at Trinity College, Cambridge, having already been elected to the Craven scholarship in 1821, and became a fellow in the succeeding year. In 1826 he was called to the bar at Lincoln's-inn. As early as 1824 he had given evidence of his literary talent by some poems contributed to various magazines, and in 1826, his essay on Milton, in the *Edinburgh Review*, drew upon him the attention of the entire reading public. The leaders of the Whig party, in acknowledgment of his literary superiority, appointed Mr. Macaulay a Commissioner of Bankruptcy, and in 1830 he entered Parliament as member for Calne. He afterwards became Secretary of the Board of Control, and entered with great spirit into the discussions of the Reform Bill, defending the policy of the Grey Ministry against all opponents. Having acquired a large amount of parliamentary celebrity, Mr. Macaulay was returned with Mr. John Marshall as member for the newly enfranchised borough of Leeds in Dec. 1832. Early in 1834, to the disappointment of his constituents, he accepted an appointment as Legal Member of the Supreme Council of India.

The avowed purpose of his Indian Mission was the formation of a code of criminal law for that country; its real

design, according to the *Daily News*, was to enable a rising young statesman to make his fortune, in order to enable him to pursue a career of statesmanship for the remainder of his life. "Ten years were talked of as the probable term of his absence, but he came back in three, with his health considerably impaired, his code in his hand, and a handsome competence in his pocket. The story of that unhappy code is well known. A great sum of money was spent upon it, but it turned out wholly worthless. It is usually spoken of by Whig leaders as merely shelved, and ready for reproduction at some time of leisure; but the fact is, that there is scarcely a definition that will stand the examination of a lawyer or layman for an instant, and scarcely a description or provision through which a coach and horses may not be driven. All hope of Macaulay as a lawyer, and also as a philosopher, was over as soon as his code was seen."

These remarks may appear severe, but they are not wholly out of place or beyond the mark. His penal code, consisting of some twenty-six chapters divided into nearly 500 clauses, was found, when published, to be wholly unpractical and impracticable; it might be admired at a distance, but it could not be obeyed: it would not work. The variety of races in India and of the customs to which it was to be applied, prevented even the attempt to enforce it. One of its enactments was so odious to the English inhabitants of India, that it was generally known at Calcutta as "The Black Act." It established the right of appeal from the local courts to the Supreme Court at the presidency, and was practically, says the *Times*, "the same measure which roused the inhabitants of Calcutta to indignant remonstrance immediately before the outbreak of the recent mutiny."

One advantage Macaulay — and also the public — derived from his Indian experience. Inspired by the scenes which he had witnessed at Calcutta, on his return to England he produced those well-known and magnificent sketches of Lord Clive and Warren Hastings — due, no doubt, to the acquaintance with Indian officials which he had acquired in Calcutta. In 1839 Mr. Macaulay accepted the office of Secretary-at-War, shortly after having been returned to Parliament for the city of Edinburgh. At an earlier period of his life, Mr. Macaulay had produced several choice ballads; but he

now tried his powers on a larger scale, and in 1842 gave to the world his "Lays of Ancient Rome." His essays, which had been previously published in America, were, in the following years, collected into three volumes. It is needless here to notice the profound learning, the extent of information, and the surpassing eloquence which characterize these productions. It is believed that his latest contribution to the Edinburgh was the second part of his "Essay on Lord Chatham," which appeared in the autumn of 1844.

On the restoration of the Whig party to power in 1846, Mr. Macaulay was appointed Paymaster of the Forces, with a seat in the Cabinet. In consequence, however, of a serious disagreement between the honorable gentleman and his constituents, with regard to the Maynooth grant, the citizens of Edinburgh rejected him at the election of 1847 in favor of Mr. Cowan. This, which, under ordinary circumstances, might have been a subject of regret, must now be accepted as a matter of congratulation; for, untrammelled with the cares of public life, the hon. gentleman devoted his leisure to the grand project he had formed of writing a history of England. His past official life and his literary acquirements eminently fitted him for such a task. In 1849 the first two volumes of his "History of England" appeared. Never, perhaps, was the reception given by the public to any work equal to that of these and the two later volumes of the "History." In 1852 Mr. Macaulay and his former constituents of Edinburgh were reconciled; he was spontaneously elected by them without himself taking a single step towards that object, and he continued their member until raised to the House of Lords in 1857.

As a member of the Upper House of Parliament, Lord Macaulay's voice, we believe, has not been heard, owing to ill-health, against which his life has long been a continued struggle. There was, however, no cause for anxiety till about a fortnight before his death, when he experienced an attack of disease of the heart. He, however, had rallied from his illness, and two days before his death entertained some of his relatives and friends at Holly-lodge. He was attacked with his old enemy about eight o'clock P. M. on Wednesday, the 29th ult., and expired the same evening. Lord Macaulay was never married, and his title expires with him. Of the character of the great work by which his name will be known hereafter, it would be out of place to

write here; we will only therefore add that, in the introduction to that work, the author expressed a hope that he might be enabled to bring down the history of his country to a date within the memory of living men; but unhappily this hope is very far from being realized. For some time it has been rumored that the fifth and sixth volumes of the work were about to appear, but even with this addition to the history, the work of the noble author will be but a fragment after all. Like Arnold, he has been struck down by the hand of death in the midst of his labors —

Atque opere in medio defixa reliquit aratra.

His History and his Essays will prove a lasting memorial of Thomas Babington Macaulay, as he sleeps by his father's side in Westminster Abbey; but the former will be only a fragment after all —

A strong bow stands unstrung, and none can bend it;
A story stands half-told, and none can end it.

Lord Macaulay was elected a bencher of Lincoln's-inn in 1843, appointed Professor of Ancient History in the Royal Academy in 1850, and High Steward of Cambridge in 1857.

United States District Court. Massachusetts District.

October, 1859.

In Admiralty.

THE BRIG SUSAN.

When a vessel is in such peril as to be the subject of salvage service, a pilot, by the general law, is not bound to give his aid for mere pilotage. If, in such case, the vessel hoist her colors at the fore-topmast head, it will be deemed a request for assistance, although it be the usual signal for a pilot.

Salvors cannot force themselves upon a vessel in distress against the will of the master.

It is at his option to accept their service or not.

But, if he has requested their assistance by a signal of distress or otherwise, and they have incurred danger, expense or labor, in compliance with such request, and their aid has then been refused, *it seems*, they have a right to some compensation, at least, if the vessel ultimately comes to a place of safety.

Where aid in saving a vessel from a sea-peril is rendered under a contract, it is a salvage service, unless by the terms of the contract the compensation is to be absolute, and not contingent upon success.

In fixing the amount of salvage compensation, it is proper to take into view the policy of encouraging competent persons on a dangerous coast to associate together and keep themselves prepared with boats and other appliances, to render prompt assistance to vessels in distress.

SPRAGUE, J. — This was a libel for salvage. I have no doubt that this vessel was in such peril as to be the subject of salvage-service, and that the libellants went on board from the shore and aided in bringing her to a place of safety. But it is insisted that they are not entitled to a salvage compensation because it was understood between them and the master before and at the time the assistance was rendered, that it was to be merely pilotage.

This requires examination. It appears that on the 6th of February this vessel made sail from Holmes' Hole, bound for Boston. After proceeding about fifteen miles, her lumber ports were stove in by sheet ice, and in five minutes she was filled with water, and sunk as low as her cargo of lumber would permit. Her cabin and her rails were submerged, and only the extremities of the stern and bow and the upper part of the deck-load of lumber were above water. The crew could have neither fire nor shelter, and most of their clothing was wet. The water flowed into her so freely that no attempt was made to free her from it by the pumps or otherwise. In this condition she made a signal of distress, and was soon afterwards taken in tow by the brig *Rebecca*, belonging to the same owner. The weather being mild for the season, and the wind moderate, some consultation was had between the masters of the two vessels about proceeding to Boston; but it was concluded that the *Susan* should go into Monomoy point. The master of the *Susan* was on board the *Rebecca*, and her flag was then hoisted at the fore-topmast head as a signal. Upon seeing this, eight of the libellants proceeded in a boat toward the *Rebecca*; and as they approached her the master of the *Susan* inquired if they had a pilot; to which one of them, James Colson, replied that he could take her in, referring to the *Susan*, then water-logged and in tow.

There is testimony that Capt. Lowd, the master of the *Susan*, said that a pilot was all that he wanted, and that he needed no other assistance. But it is not stated that any response was made to this by any of the libellants, and I

am not satisfied that it was said to them or made known to them so that they understood or ought to have understood that whatever they should do would be only as pilots, and for mere pilotage compensation.

Immediately after getting on board the *Rebecca*, she and her tow, by advice of Colson, were taken into shoaler water, and there anchored as a place less in danger from ice until the tide should favor her going into harbor. In the mean time four of the libellants, at the request of Capt. Lowd, took the steward of the *Susan* and the clothes of her crew on shore, and afterwards returned. While this boat was absent, the *Rebecca* departed and kept on her voyage. Soon after the return of the boat, with the aid of the libellants, the anchor of the *Susan* was weighed, and she attempted to get into the harbor of Monomoy, steering partly by her rudder and partly by her sails. Being very deep in the water she took the ground: thereupon a part of the libellants went in her boat to the light ship half a mile distant, obtained a kedge anchor, and aided in kedging her off the shoal and into the harbor. These were, in their nature, salvage services. In weighing the evidence with a view to determine whether the libellants were by agreement restricted to mere compensation of a single pilot, all the circumstances should be taken into consideration. No one of the libellants was a pilot by commission or appointment; and, if they had been, the *Susan* was in such condition that they would not, by the general law, have been bound to go on board and aid in getting her into port merely as pilots. *The Hebe*, (2 Wm. Robinson, 247.) The presumption, therefore, is that the service was understood by the parties to be salvage, unless it be shown by satisfactory evidence that there was a different agreement. In *The Hædwig* (24 Eng. and Law and Eq. 582,) a vessel in a condition to be the subject of salvage service made a signal for a pilot by hoisting her colors at the fore-topmast head, as in the present case, and when a boat came alongside the master of the vessel said he wanted one man as a pilot; and the boat's crew—none of whom were commissioned pilots—aided in getting the vessel into port, it was held, that they were entitled to salvage. Dr. Lushington, in giving his judgment, declared that he should hold a signal, under such circumstances, to be a signal for assistance, and not for a pilot, and awarded salvage. He does not notice

the fact, stated in the protest which was in evidence, that the master of the vessel said to the boat that he wanted one man as a pilot, but construed the signal as a request for assistance; and, as the assistance needed and actually rendered was in its character salvage, and not mere pilotage, he decreed a salvage compensation. It may, perhaps, be inferred that in his view the receiving of such assistance overruled the mere declaration that a pilot only was wanted. The cases in 2 *Paine*, C. C. 466, and 1 *Caines* 10, were decided upon the positive enactments of a New York Statute.

Salvors cannot force themselves upon vessels in distress against the will of the master. It is at his option to accept their services or not; and if he refuse them, compensation cannot be recovered for assistance subsequently rendered against his will. I am not speaking of cases in which the master fraudulently attempts to destroy his vessel; for in the present case there is no doubt of his good faith towards the owners and underwriters. Or if the aid of salvors be accepted only upon a clearly understood condition that it shall be deemed merely pilotage, they will be limited to mere pilotage compensation. But I hold, with Dr. Lushington, that a signal, made by a vessel in actual distress, and needing other assistance than pilotage, although it be the usual signal for a pilot, shall be deemed a signal for assistance.

In such case the vessel has no right to make a signal merely for a pilot. Pilots are not bound, unless by statute, to take the hazards or subject themselves to the labor of going on board and aiding such a vessel for mere pilotage compensation. But suppose such a signal is made, or an actual signal of distress is held out, and persons are thereby induced to go on board to render assistance, and then the master of the vessel, who has made the signal, refuses to accept their services or will receive them only upon conditions to which they are under no obligation to accede, are they to be entitled to no compensation? This, I believe, is a new question, although such a state of fact has some time actually existed.

A signal of distress is a request for assistance. And, if competent persons upon such request subject themselves to labor and danger and expense to get on board the vessel, and there offer their services for such reward as the law will give them, if such offer be rejected it would seem that

some compensation should be made for the labor, expense, and danger so incurred, at least in cases where the vessel subsequently comes to a place of safety. Several cases have heretofore been presented to me where boats have put off from the shore, to vessels making a signal of distress, with great gallantry and hazard to life in launching through the surf, and where the subsequent service of getting the ship out of danger was comparatively trifling. The chief merit and principal ground of compensation was their great courage, skill, and danger in reaching the ship; and I should be slow to believe that in such case they would be deprived of all reward at the option of the master in rejecting their services after reaching his ship. But, in the present case, this question need not be decided, and comes into view only in giving construction to the acts of the parties, in order to determine in what character the libellants really acted. In my opinion their services were not refused nor accepted upon condition that they should be deemed mere pilotage, but were properly rendered by them as salvors.

It is true that these services were rendered upon the request of the master, and with some understanding; that is, under a contract with him. And it is sometimes said that the service is not salvage if performed under a contract. This is quite inaccurate, and it is important that the error should be pointed out. In far the greater number of salvage cases the services performed are by agreement; that is, a contract between the salvors and the agent of the owners. Take the common case of a vessel in peril sending a boat ashore for assistance, and upon their request and by mutual agreement certain persons, with a boat or a sailing vessel or steamer, rendered the desired assistance, nothing being said about compensation. The law declares what the compensation should be, viz., meet and suitable salvage if property be saved, and no pay if nothing is saved. But it is competent for the parties to go further in their contract, and stipulate what the compensation shall be. They may agree that if the property be saved a specified sum shall be paid. That is still a salvage compensation, although the amount is fixed by the previous agreement of the parties. They may agree that compensation shall not be contingent upon success, but payable at all events for the time and labor bestowed. And in such case if no sum be named, the claim would be only for a *quantum meruit*, payable abso-

lutely whether property be saved or not. This not being contingent upon the safety of the property, is not salvage. But the party who asserts that there was a contract which displaces salvage, or which fixes the amount, assumes the burthen of proving affirmatively the existence of such contract. It is not sufficient for him to show that there was some contract; but he must go further, and prove that it was agreed that the compensation should be absolute, and not contingent, otherwise the law will say that it was to be contingent upon the saving of property.

The cases of the *Versailles* (1 Curtis, 353,) and the *Independence* (2 Curtis, 350,) rest upon these principles. On land the law is otherwise. If a person requests another to labor in saving his crops and other property from danger and loss, and nothing is said of compensation, the employer is to pay a reasonable amount at all events.

But here, again, the parties may, by their express contract, make the compensation contingent upon success; for land services the law gives a *quantum meruit* without regard to success, unless it appears that the parties had made a different agreement. But for services in rescuing property from perils of the sea, the law gives no compensation unless the property is saved. And the error in which some learned lawyers have fallen as to the right to salvage, is in looking at the subject only by the light of common law doctrines applicable to services on land. In this case it is not proved that there was a special agreement for an absolute compensation, or fixing the amount.

It remains only to consider what amount shall be awarded.

The vessel and cargo were worth about \$5000. The time occupied by the eight libellants, who first went to the *Susan*, was from ten o'clock in the morning till twelve at night. Thirteen others of the libellants went on board about eight o'clock in the evening, and continued to aid or were ready to aid until twelve o'clock; but I do not think the assistance of so many was by any means necessary. The labor and hazard were inconsiderable, but the service was promptly rendered, and the compensation was contingent.

There is one element which I have heretofore taken into view in some cases, and which is not to be wholly overlooked in this. It is that encouragement should be given to competent persons upon dangerous parts of our coast to associate together and keep themselves organized with suit-

able boats and other appliances, to render prompt and efficient assistance to vessels in distress.

Decree for \$250 and costs.

J. Wilder May, for libellants.

E. F. Hodges, for claimant.

Supreme Judicial Court. Massachusetts.

In Equity. January 9, 1860.

[Before HOAR, J.]

J. BARDWELL ET AL. *v.* E. R. MUDGE ET AL.

GREENFIELD BANK ET AL. *v.* SAMUEL F. LYMAN ET AL.

Where a factor, having a lien on the goods in his hands, has made advances for his principal, and has become liable for him upon drafts, and other contracts, and both parties fail, the goods upon which the lien was held, and the proceeds thereof, are to be applied, first, to the payment of the cash advances made by the factor, and next, to the payment, *pro rata*, of the outstanding debts of the principal for which the factor had become liable, and to which the lien applied.

These were bills in equity brought by the plaintiffs in behalf of themselves and of all other creditors of the Northampton Woollen Manufacturing Company, and of the Grafton Company, respectively, having the like rights with themselves, against the assignees of Charles H. Mills & Co., and others.

The facts were similar in each case. The firm of Mills & Co. were the factors, to whom the manufacturing companies consigned their goods for sale; and the consignors made drafts to a large amount, which were accepted by the factors, and they also gave notes which were endorsed or guaranteed by the factors, who, it was conceded, had, by law, a lien on the goods and the proceeds thereof, for their security. Mills & Co. also held a mortgage upon some of the fixed property of the manufacturing companies as farther security for their advances and liabilities. Mills & Co., and the manufacturing companies, failed, and were duly declared insolvent, and the assignees of Mills & Co. disposed of the goods remaining on hand at the time of the failure, and received the proceeds thereof; they also

received the proceeds of sale of the mortgaged premises, which were disposed of by order of the Insolvent Court.

The plaintiffs represented the creditors who held drafts, notes, and other evidences of debt, drawn or endorsed by the manufacturing companies, respectively, and to the payment of which Mills & Co. were bound as acceptors, guarantors or otherwise. The plaintiffs had proved their debts in insolvency, for the full amount, against the estate of Mills & Co., and of the manufacturing companies, respectively.

The plaintiffs contended that the assignees were bound to appropriate the proceeds of the sales of goods, and of the mortgage, first, to discharge any cash balance due to Mills & Co., at the time of the failure; and next, towards the payment, ratably, of all the creditors holding the class of debts above mentioned. And, in support of their position, they cited several English cases.

The defendants contended that the assignees of Mills & Co. were entitled to hold the goods for the indemnity of the estate of Mills & Co. against these debts; and that, by proving their claims, the plaintiffs had waived any rights they might have had.

But the court decided in favor of the plaintiffs, and referred the case to a master to report the amount in the hands of the assignees which was subject to distribution among the creditors of the class represented by the plaintiffs, and also a list of the creditors of that class, and the amount due to each; and that the proofs in insolvency be reformed by deducting therefrom the amounts distributed to the creditors under this decree, leaving them to stand good for the balance only.

J. Lowell and W. Dwight, for creditors of Grafton Co.

G. T. Davis and W. S. Dexter, for creditors of Northampton Co.

A. H. Fiske, for assignees of Mills & Co.

Vermont Supreme Court, Chittenden Co., January Term, 1860.

STACY v. THE VERMONT CENTRAL RAILWAY CO.

Practice — Exceptions — Use and occupation.

Where a question of law has once been decided by this court, and the case ordered to a new trial before the jury, the same question cannot be revised, in the same case, upon a new bill of exceptions, presenting substantially the same facts.

Where the defendants entered upon the plaintiff's land; surveyed and located their road upon it, and commenced and continued work upon it, for a considerable time, by proceedings, which were never so far consummated as to enable the plaintiff to recover his land damages, and the route thus surveyed was ultimately abandoned by the defendants, and their road located in another place,—

Held, that defendants are not liable, under a count, for use and occupation, not having entered, or occupied, under the permission of the plaintiff, but under a claim of right.

DANFORTH v. BENEDICTS.

Libel.

It is libellous to publish of a postmaster, who is also the publisher of a newspaper, that the "Blue Book tells us that the postmaster of this town, meaning the plaintiff, has his clerks paid by the department, naming the clerks and their salary, as stated by the Blue Book, and then adding that the place of one of these clerks in the post office is supplied by a small boy, at a much less sum, and the clerk employed by the postmaster as a compositor in his printing office." The natural and ordinary import of such an article is, that the plaintiff, while he is postmaster and publisher of a paper, contrives by fraud and official corruption to have the compositors in his printing office paid as clerks in the post office, while their services are not required there, and that they are in fact employed as compositors in the printing office during the very time they receive such salaries, as clerks in the post office.

But it is a good plea to an action upon such libel, that it appears by the Blue Book that this very person is paid a

salary as clerk in the post office, and that he is, in fact, employed at the same time as a compositor, by the plaintiff, in his printing office, and his place supplied in the post office by a small boy, at much less wages,—without alleging the truth of the matters found in the Blue Book, or that defendants believed them to be true, and therefore published them in good faith.

MASON *v.* WHIPPLE & RUSSELL.

Attachment — Sheriff.

Where Gleason, as sheriff, had a writ delivered to him to serve upon one Briggs, and the two defendants, (they being in fact sureties for Briggs,) and Gleason informed one of defendants that he had such writ, and such defendant told him to attach certain property of Briggs, which was sufficient to secure the debt, and Gleason thereupon procured a writ in his own favor, and had the plaintiff specially authorized to serve the writ, who served it by attaching such property and left a copy of such attachment in the town clerk's office, as the statute requires, and Gleason made an attachment of the same property, subject to the plaintiff's attachment, by leaving a copy in the town clerk's office, and after judgment had been recovered upon the writ in Gleason's hands, the property was sold by defendants, by Briggs' consent, at private sale, and the proceeds applied in payment of this debt.

Held, that plaintiff, the lien upon Gleason's own writ having been perfected by judgment and execution, might recover of defendants the value of the property thus sold and applied upon the other judgment.

HARD, ADM'R. *v.* VERMONT & CANADA RAILWAY CO.

Master and servant — Liability for negligence of fellow-servant.

The intestate lost his life, as engineer, upon the defendants' road, by the explosion of his engine. The proof showed that the engine was of approved construction and material when purchased and placed upon the road, but that by subsequent use the stay-bolts about the fire box had become unsafe and many of them broken, which could not have been discovered by the engineer, but might and should have been by the master mechanic of the defendants' machine shop, whose business it was to inspect and keep the engines in repair, and to direct what engine and engineer should run upon

each trip. The case was decided upon the ground that the intestate was directed to run the engine upon the trip when it exploded, although the testimony was conflicting upon this point.

Held, that a railway company is not liable to one servant for an injury resulting from the negligence of a fellow servant.

That this exemption extends to the conduct of all the employees of the company who are engaged in the common business of operating the road, in whatever relation of subordination to each other.

That the company are responsible to their servants or employees; that all the machinery when put upon the road, or in any way into their use, shall be of approved construction and material, and that every one employed shall be of competent skill and experience for his place, and of general good habits and character, so that no blame shall in any way fairly attach to the company, in regard to the purchase of machinery, or the selection of help. But that the company are not responsible to such employees for the diligence and faithfulness of their co-laborers, in keeping such machinery in such repair as to be always safe for use when put into the hands of those whose business it is to use it. This is a part of the hazard which they impliedly assume when they undertake employment in such an enterprise.

That when the company employ agents to purchase machinery, or employ laborers, or mechanics, of every grade, they are responsible to all in their employ for the acts of such agents, the same as if the service had been done by the directors themselves. For this being a service for the performance of which the directors are personally responsible to their employees; they cannot excuse themselves from responsibility by shifting its burden upon subordinates.

But unless the service is one for which the directors are personally responsible to their employees, and the neglect or imperfect performance of which implies personal blame, the company are not ordinarily responsible to one servant for the negligence of a fellow servant.

BECKWITH v. FRISBIE.

Special carrier — Voluntary payment.

Where one has possession of plaintiff's goods, as a special carrier, and makes an exorbitant demand for charges

incurred during the transportation, or for charges which it is the duty of the carrier to bear, and the plaintiff pays such charges in order to obtain possession of his goods, under protest and notice that he shall bring suit for the money, in order to try the right, he is not precluded from a recovery on the ground that the payment was voluntary.

If a special carrier undertake to transport a cargo of oats from Burlington, Vermont, to New York, for six cents per bushel, it being late in November, but both parties believing that the voyage may be accomplished before navigation closes, and both being desirous of having the voyage commence at once; and after the voyage is begun, in consequence of ice in the canal, it became impracticable to proceed until spring, and expense is necessarily incurred in storing the cargo during the winter, such expense should be paid by the owner of the goods, at the time of delivery at the place of destination.

TIBBETTS *v.* HARD.

Spirituous liquors — State law.

Spirituous liquors imported under the laws of Congress, while it remains in the original casks, may be sold in bulk, (notwithstanding the provisions of State laws,) but not otherwise. Liquors so imported and brought into this State, and left with a person (having no license to retail such liquors,) for safe keeping, with permission to use the same, if he so elect, it being the expectation of both parties that if he did use it he would retail it, in contravention of the laws of the State, and which was subsequently so disposed of, may nevertheless be recovered for, in an action of book account.

PRATT & REOTH *v.* BUNSMID & TRUSTEE.

Principal and surety — Nudum Pactum.

Where one becomes surety for two persons, but subsequently agrees with them to look exclusively to one of them for indemnity, all parties at the time supposing that the surety owed such one of the principals an account equal to the amount which he had paid as surety, and this agreement is acquiesced in by all the parties for many years, it becomes binding, although not originally made upon consideration; and notwithstanding upon settlement, it appeared that the

account was less than the amount paid by the surety. A naked promise, which is originally revocable at will, becomes binding and irrevocable when so long acquiesced in that the parties cannot be placed in *statu quo*.

NICHOLS v. NUDGETT.

Bribery—Sale of vote — Illegal contract.

Where the plaintiff, having a balance of account against the defendant of \$165, proposed to discharge the same, if the defendant would use his influence to have him elected town representative, and he should be so elected; to which defendant replied, that he had voted for the opposite party, but upon these conditions he would do what he could to secure plaintiff's election; the plaintiff gave defendant \$10, and told him "to use it to the best advantage," telling him of one person who was friendly to his election, but who always refused to attend the meeting unless paid \$1; the defendant used his best endeavors, and voted for plaintiff himself, which, but for the contract, he would not have done, and the plaintiff was elected.

Held, that this was an illegal contract for the sale of one's vote and influence, at an election, which the law will not justify or recognize; and that the agreement to discharge the account is therefore invalid, and the account remains a valid, subsisting debt, and may be recovered.

O'GRADY v. SHERMAN.

Slander.

A plea in an action of slander, of the truth of the words spoken, must justify the very words spoken, and in the sense in which they are set forth in the declaration, with the accompanying averments and innuendoes.

If the defendant wish to put in issue the truth of the colloquium and innuendoes in an action of slander, he must plead the general issue; and may thus require the plaintiff to prove the words spoken in the sense attributed to them in the declaration, and may himself put in, by way of exculpation, any evidence tending to show they were not spoken in that sense.

STATE v. McDONNELL.

Murder.

Where two persons have a clinch, by mutual consent, and one is fatally wounded by a deep cut in the chest, from a large pocket knife, and there is no express proof of previous malice, the law presumes, as matter of fact from the ordinary course of human experience, that the use of a deadly weapon upon a vital part did proceed from preconcerted malice, and the offence is *prima facie* murder.

But if there is any proof in the case, either from the testimony on the part of the prosecution or the defence, that the knife was drawn after the affray commenced, and without any purpose of doing so in the onset, and without even thinking of the knife as a possible resort, in order to overcome the deceased, if he should otherwise be unable to do so, and that the deceased struck the first blow, and thus induced mutual blows, and such heat of blood as to render the respondent so far excited as to be incapable of deliberation, and he thus gave the mortal wound with the purpose of taking life even, it is, nevertheless, but manslaughter.

So, too, if from all the testimony in the case, this is reasonably doubtful, the jury should find a verdict of manslaughter.

And if in the trial of the case this view was not presented to the jury, but the court refused so to do, upon the request of the defendant's counsel, a new trial should be accorded.

But if the jury are satisfied, beyond rational doubt, that the wound was inflicted with deliberation, and with the purpose of taking life, it is murder, although such purpose was formed at the very moment of inflicting the wound.

And the law regards the act as performed with deliberation and with the purpose of producing the ordinary consequences of such an act, unless there is proof of some provocation which the law regards as a sufficient excuse for passion and heat of blood. Mere words are never a sufficient excuse for that.

ADAMS v. SOULE & PUTNAM.

Equity — Issue sent to court of law.

Where an issue of fact is sent from a court of equity to a court of law, to be tried by a jury, and is there submitted

to the jury, it is the duty of the jury to divide the whole issue, and the law provides no mode whereby they can be properly discharged, until they have performed their whole duty. But necessity sometimes compels courts, contrary to the law, to discharge a jury, when there arises an absolute impossibility for an agreement. And when that is done, it is competent to accept their verdict upon such issues as they are agreed upon. And when this is done and returned to the Court of Chancery, they may proceed and decide the case, or return it to the court of law for a further trial, in their discretion.

In such cases, if either party except to the mode of trial in the court of law, or desire further trial before the jury, they should move the Court of Chancery to that effect at the earliest convenient time, and unless they do so such claim will be regarded as waived.

DANIELS *v.* DANIELS.

Divorce — Refusal to support.

The court will not grant divorce for "unreasonably and cruelly refusing to support the wife," unless the husband has property sufficient to enable him to support the wife without the necessity of personal effort, and he may refuse to labor for her support, without any reasonable excuse therefor, and still not bring the case within the statute.

Supreme Court of Vermont. Franklin Co., Jan. Term, 1860.

PERRY *v.* LEACHE.

Parent and child — Contract for services — Quantum meruit.

Where the father authorized his son to go and find a place to work, and he accordingly contracted with the defendant to labor for him eight months, for \$10.50 per month, and signed a written contract to that effect, fixing the time to begin, and returned home and stated to his father the general nature of the contract, but made no mention of the writing he had signed, and the father consented that he should commence the service, which he accordingly did, and about one week after the father called upon defendant to see whether the son was satisfied with his place, and the defendant with the manner of his work; and the defendant

agreed that if the son was dissatisfied he might leave; and if he was dissatisfied with the service of the son he would pay him up and dismiss him, but made no mention of the writing,—the plaintiff being still wholly ignorant of its existence —

Held, that this must be regarded either as a revocation of the written contract altogether, or such a modification of it, that either party might terminate the services whenever he, in fact, became dissatisfied, although such dissatisfaction did not proceed from sufficient cause.

That whether such dissatisfaction in fact existed, at the time the son left the service of the defendant, was a question of fact merely, and the decision of the auditor thereon conclusive.

That this will not justify the parties in terminating the contract because it is not still advantageous to them, because the defendant can hire for less, or the son can obtain more wages. It must be an actual dissatisfaction, on the one hand, with the services of the son, and, on the other, with the employment with defendant; neither feigned dissatisfaction, nor a dissatisfaction arising out of facts and circumstances, disconnected with the service.

But if the son do not perform the entire contract, the plaintiff cannot recover for the service rendered at the price stipulated for the whole term, but only upon a *quantum meruit*, which in such case is the value of the service to defendant.

HOGABOOM v. STEINHOOR.

Principal and agent — Evidence.

Where the defendant was employed by a house in Boston to purchase produce in the country, and forward the same by railway, and he took butter of the plaintiff, giving a receipt, signed with his own name only, but containing an acknowledgment that he had received the butter to send to the house in Boston, naming them, it was

Held, that in order to exonerate himself from personal liability it must appear,

1. That he had authority to purchase upon the credit of the house for whom he was purchasing.
2. That he made known this fact to the plaintiff at the time of purchasing.

3. That the credit was in fact given to the principals and not to the agent. That these questions should be determined by the auditor as matters of fact.

That upon the first question, the manner in which the defendant transacted similar business with other parties, about the same time, and when he was confessedly acting under the same contract with the Boston house, was evidence tending to show the defendant's understanding in regard to his right to pledge the credit of his employers, in the purchase of commodities, and was improperly rejected by the auditor, when offered by the plaintiff.

STILPHIN *v.* PHELPS.

Contract — Transfer of written contract — Parol evidence.

Where the defendant, by parol and without writing, agrees to perform with the plaintiff, a written contract, before that time made by defendant with a third party, it is proper to admit proof, *viva voce*, in regard to the construction which the plaintiff and defendant put upon the written contract between the original parties, at the time its performance was transferred to plaintiff. In such case the contract between plaintiff and defendant rests wholly in oral proof, although reduced to writing as between the original parties; and it is proper to receive not only the writing, but what was said at the time of transfer between the parties, as to their understanding and its import and interpretation.

LASELL *v.* HOUGHTON.

Reference by rule of court.

Where the statute authorizes the parties to an action or other controversy, to refer the same in a justice's court, and provides that the rule shall be made returnable to the justice, when the matters in demand do not exceed fifty dollars; but otherwise, to the county court, and requires the referees to conform to the rule issued by the justice as to the time, place, and manner of making the report, and such a reference is made returnable to the next term of the county court after it issued, naming the time of the session as fixed by law, or to the justice, at a day fixed, which was prior to the next term of the county court —

Held, that the rule of reference could not be enlarged by the consent of the parties, before the referee, so as to enable the referee to hear the case, after the time fixed in the rule for the return of his report, and to make report to a subsequent term of the county court. Such proceedings, being wholly without the rule, offered no jurisdiction to the county court to enter judgment upon the report. Their judgment thereon was accordingly reversed, and the proceedings dismissed, and the defendant allowed his costs, in the county court and in this court.

The proceeding may be valid, as an arbitration, and the award conclusive upon the rights of the parties; but it is not so far conformable to the statute as to form the proper basis of a judgment in the county court, upon motion, and without previous suit.

STATE *v.* HUMPHREY.

Larceny — Conversion of property hired.

This is a conviction for larceny in stealing a horse. The proof on trial showed that the prisoner hired the horse professedly to go to St. Albans, and return immediately. He passed St. Albans, and continued his journey into the county of Chittenden, — some forty miles beyond St. Albans, — where he put up for the night at a public house, and in the morning, being unable to pay his bill, the host detained the horse, where it was soon after found by the owner. The prisoner, after being refused his horse by the taverner, pursued his journey on foot towards the State of New York until overtaken by the officers of justice and brought back. He voluntarily confessed that he intended to have taken the horse into some by-place in the State of New York and thus dispose of it; and the jury found that the prisoner intended to steal the horse from the first. Exceptions were taken at the trial to the sufficiency of the conviction, and the prisoner's counsel claimed that, as there had been no actual conversion of the property, he could not be convicted of larceny, and cited *Regina v. Brooks*, 8 Car. & P. 295.

Held, that the conviction was proper. The bailment being originally fraudulent, and only a device to obtain possession of the property, and with a felonious intent from the beginning, is the same as if the prisoner had taken the

property without permission. And if this were not so held, and proof of actual conversion were required in such cases, it is most abundant in the present case. Conveying the property beyond the place for which it was hired is as much a conversion as if the prisoner had sold it.

The case of *Regina v. Brook* seems to have been decided by the court (Ch. J. Tindal), upon the ground that the hiring was for a definite time, which had not expired when the prisoner was arrested. And that although he drove the horse and sulky beyond the place he named at the time of hiring, this was no conversion, as the hiring was of the use for a definite time unexpired, and this gave the prisoner the right to use it, in any way he chose during the term. But the case, in any view, has been doubted, and seems scarcely defensible upon principle. And, in the most favorable view for the prisoner, there seems no ground to question the regularity of the conviction in the case now before us.

RECENT ENGLISH CASES.

House of Lords.

CHASEMORE *v.* RICHARDS.

Right to water percolating under ground.

The right to the enjoyment of a natural stream of water flowing on the surface is a natural incident to the ownership of the soil through which it flows, and is not dependent on prescriptive or a presumed grant. It is analogous to the right which an owner of land has to have it supported, in its natural state, by the soil of his neighbor.

But where the water percolates under ground in no defined course, the owner of the land may intercept it, though the waters of a stream should be sensibly affected thereby.

Where such an owner dug a well on his own land, not only for his own use, but for the supply of a large neighborhood, and intercepted such water which percolated into

a stream which turned the plaintiff's ancient mill, and the mill was injured thereby.—*Held* (affirming the judgment of the Exch. Ch., Lord Wesleydale doubting), that no action would lie by the mill owner against the owner of the well.

DOE *dem* EVERS *v.* CHALLIS.

Devise—Contingent remainder—Executory devise.

Testator devised land to his daughter A., for life; and on her decease to her children; if sons, at twenty-three, and if daughters at twenty-one years; and if she should die without leaving a child who should attain the age aforesaid, then the share or shares which such child or children would have had, to go to the children of the other sons and daughters of the testator; if sons, at twenty-three, and if daughters at twenty-one. A., the daughter, died without ever having a child.

Held (reversing the judgment of Exch. Ch.), that although the devise over would have been void as an executory devise, for remoteness, yet the contingencies might be separated, and the devise hold good, in the event which had happened, as a contingent remainder.

BRISTOL AND EXETER RAILWAY CO. *v.* COLLINS.

Railway carrying beyond their line—Contract.

C. delivered goods to the great Western Railway Company, addressed to T., at a place which was on the line of the Bristol and Exeter railway, a continuous line to that of the Great Western. The Great Western Company took one charge for the whole distance, and were in the habit of sending their van and guard along the Bristol line with goods addressed to places on that route.

The contract, or "sending-note," contained this condition: "The Company will not be responsible for goods lost by fire. All goods addressed to consignees beyond the Great Western Company's limits will be forwarded by public carrier or otherwise, but the charges of such carrier will be added to those of the Company, and the responsibility of the Company will cease when the carrier has received such goods. And the Company give notice that any money received for conveyance by other carriers is received by the Company only for the convenience of the assignors, and

the Company will not be responsible for the loss of goods, beyond their own limits." The goods were lost by fire, after being delivered over to the Bristol line, and the owner sued the Bristol Company.

The Court of Exchequer held that the defendants were not liable, on the ground that the condition above cited referred to the delivery of goods to carriers after the transit had ceased, and not to the transportation of the goods on the line of the railway, although beyond the limits of the Great Western line, and, therefore, on the authority of *Misschamp v. Lancaster and Preston Railway Company*, 8 M. & W. 343, the contract was with the Great Western Company, and not with the defendants. The Court of Exchequer Chamber reversed this decision. But the House of Lords confirmed it, in accordance with the advice of Martin & Watson, B. B., and against that of Byles, Compton, Williams, and Wightman, J. J.

IMPERIAL GAS CO. *v.* BROADBENT.

Nuisance — Action at law — Injunction.

A gas company having erected works near A's market garden, and by the manufacture of gas injured his trees and shrubs, and interfered with his business, he brought an action at law which was referred to an arbitrator, with power to order what should be done by the parties in future. The arbitrator awarded damages to A., but did not award what else should be done, neither party having requested it. Judgment was entered on the cause, and for the damages.

Held (affirming the judgment of the Lord Chancellor), that the award was equivalent to a verdict.

That no new action was necessary in consequence of an alteration in the works, if the Court of Chancery were satisfied that the nuisance still substantially existed.

That the injury not being done under the authority of the act of Parliament, was not to be compensated under the Land Clauses Act.

Court of Appeal in Chancery.

TAYLOR *v.* THE GREAT INDIAN PENINSULA RAILWAY CO.

Vendor and purchaser of shares—Blank transfers—Usage.

The owner of one hundred and twenty shares of £20 each, and also of sixty shares of £2 each, in a railway

company, instructed his broker to sell the shares of £2 each, and the broker soon after brought him two deeds of transfer, in which the names of the transferees, and the numbers by which the shares were distinguished, were left blank. The stamps upon the deeds were large enough to cover eighty of the £20 shares, which was not observed by the owner, who executed the transfers with the blanks still unfilled, supposing that they were intended to convey the shares of the smaller value. The broker agreed with B., another broker, upon the open stock exchange, to sell him eighty of the £20 shares; he then filled in the numbers which applied to eighty of these shares, and handed the transfers to B., who filled in the names of the transferees, who paid full value, and procured the transfer to be registered. Upon a bill filed by the original owner, against the railway company and the transferee, *held* (confirming the decree of Wood, V. C.), that as the purchasers had accepted the transfers knowing that they had no legal validity, (the name being still in blank when they received them,) were not in the condition of innocent persons without notice, and could not maintain any title against the injured owner.

And that an admitted and universal custom of the stock exchange to deliver deeds of transfer in blank could not be supported against a clear rule of law.

V. C. Kindersley's Court.

CURTIS *v.* CURTIS.

Parent and child—Custody in case of divorce.

The Court of Chancery, where a separation has been granted at the suit of the wife, for cruelty of the husband, will not decree to the wife the custody of the children merely because her custody would be, on the whole, more advantageous for them. It cannot deprive the husband of his right, unless it clearly appears that he is, from unsoundness of mind, or other cause, absolutely unfit to retain it.

Divorce and Matrimonial Causes Court.

MATTHEWS *v.* MATTHEWS.

Divorce—Lapse of time—Deed of separation.

Plaintiff was married to defendant in 1844, and lived with him until 1853, when a deed of separation was made, and they have not since cohabited. The court will not now decree a divorce *a mensa et thoro*, for cruelty committed before the deed of separation.

Supreme Judicial Court of New Hampshire.

BAY STATE IRON CO. v. GOODALL.

Creditor's bill for discovery.

A creditor whose execution is returned unsatisfied, may maintain a bill for discovery of the debtor's estate, either by virtue of the statute, or of the general principles of equity.

Such a bill may be maintained against the debtor alone.

It may demand from the debtor a disclosure of his assets, and of the names of his debtors in general terms.

It may be brought in the county in which either party resides, if both reside in the State, or in any county if the plaintiff resides out of the State.

The return of the execution unsatisfied may be made by a sheriff of the county in which the defendant resides.

A demurrer will not be sustained to such a bill, on the ground that the party cannot answer without exposing himself to a criminal prosecution.

The debtor may protect himself by his answer against discovering any facts, which may subject himself to a criminal prosecution.

FARRAR v. FESSENDEN.

*Entry—Foreclosure—Taxation—Copies—Possession—
Defective deed.*

A right of entry into land will pass by deed, although at the date of the conveyance the land may be holden adversely to the right of the grantor.

Affidavits of the party making an entry into land for the purpose of foreclosing a mortgage thereon, and of the witnesses thereto, and a copy of the published notice of such entry verified by affidavit, duly recorded, are competent evidence of the entry and publication, without producing the original notice or the papers in which it was published.

The taxation of land to an individual for a long series of years, and payment of those taxes by him, are competent evidence tending to show ownership, or, at least, claim of ownership thereto in him.

Taxation can only be proved by the records of the taxes, unless their loss be first shown.

Proof of the existence and transfer of mortgages and mortgage debts may be properly received to explain occupancy of the mortgaged premises by the mortgagees or their tenants.

An examined copy of an instrument which it is the duty of a public officer to record and give copies of, may be received in evidence in any proper case, without proof of the original.

Where, in a deed of land, reference is made to another deed as recorded in a particular book and page of the registry for a description, a copy of the record of that deed is admissible in evidence in connection with the deed in which the reference is made.

After proof of the original deed to himself, or of his title by descent or devise, a party may put in evidence an office copy of a deed to which he is not a party, but which constitutes part of his chain of title, without showing the loss of the original.

Continued, open, and exclusive possession of land for more than twenty years, under claim and color of title, gives a perfect title thereto.

Entry upon and continued occupation of a portion of a lot, under a deed describing the whole thereof by metes and bounds, gives possession of all the land embraced in the title under which the entry is made and the occupation continued.

It is not necessary that adverse possession, in order to be available within the statute of limitations, should commence or be continued under valid and effectual deeds; where such possession is relied upon, the idea of a rightful title is excluded; the fact of possession, and *quo animo* it was commenced and continued, are the only tests.

PETITION OF JONES ET ALS. *v.* GOFFSTOWN.

County commissioners — Their powers and duties.

County commissioners are by statute expressly authorized to determine finally the question of the competency of evidence submitted to them in road hearings.

They have, from necessity, full power and authority to regulate their own proceedings, and to determine the order and course of business before themselves.

A full hearing upon the merits, of all parties interested

and desiring to be heard, is essential to the validity of legal proceedings, and if commissioners were to refuse such hearing before them, it might furnish good cause for rejecting or recommitting their report.

STATE v. YOUNG.

Joint defendants in indictments — When not competent witnesses for each other.

One of two joint defendants, in an indictment for an aggravated assault, who has pleaded *nolo contendere*, but against whom no judgment has been rendered, is not a competent witness for his co-defendant.

Generally one, of several jointly indicted for the same offence, cannot be a witness for his co-defendants, until he has ceased to be a party to the proceedings, either by an entry of *nolle prosequi* as to him, a verdict of acquittal, or a judgment against him as guilty, upon his confession or otherwise, so that the suit is ended as to him by a judgment for or against him, and so that the result of farther proceedings in the case cannot by possibility affect either the extent or certainty of his own punishment.

HALL v. MANCHESTER.

Election — Selectmen — Highways.

The record by a town clerk, of the election of selectmen in this form: "Chose A. B., C. D., and E. F. selectmen," is not sufficient. The record should show that they were elected by ballot and by majority vote.

Although it is enough in cases where the authority of the selectmen comes incidentally in question, and in which they are not the parties to the action, to show that they were acting officers, without producing the record of their election, yet to show them acting selectmen, it is not enough merely to show that they acted in that capacity in the particular instance in which their authority is questioned.

Where the selectmen in laying out a highway, refer for a particular description, to a plan recorded in the registry of deeds in the same county—

Held, that such reference was properly made, and that the description might be aided by such reference.

And in proving the limits of such highway, the record thus referred to, or a copy of it, should be produced as a part of the description of such highway.

In case against a town for damages resulting from a defect in a highway, the defendant, under the *general issue*, can object to the legality of the laying out of such highway, nor is defendant estopped from denying its legal existence by having recognized and used such highway for any term of time less than twenty years.

WRIGHT *v.* BOYNTON.

Motion to set aside a verdict.

On motion to set aside a verdict for error in the ruling of the judge and as against evidence, the questions were assigned to this court and the motion was overruled and judgment ordered upon the verdict. On a subsequent motion to set aside the same verdict upon the ground that by mistake, accident, or misfortune, justice had not been done, which motion was founded upon the matters embraced in the original exceptions—

Held, that section 24 of the law of 1855, remodelling the judiciary, conferred no new power upon the court to grant new trials, and that the subject of the second motion must be regarded as already adjudicated.

BUNTIN *v.* SMITH ET ALS.

Bill in equity — Statute of frauds.

The plaintiff sought a decree to compel the reconveyance of real estate, conveyed to the defendant's predecessor by the plaintiff, who received back a bond for the support of himself and wife, with an agreement by parol that the estate should be holden for the performance of the conditions of the bond.

Held, that this agreement was within the statute of frauds, and that nothing could be deemed a part execution of it so as to take it out of the statute, unless the act relied upon had unequivocal reference to such agreement, and that where the act would have been the same had no such agreement existed, it would entitle the plaintiff to no relief.

DUNCKLEE v. GAY.

Mortgagee's account rendered on demand of officer.

A mortgagee of real estate rendering an account of the amount due him to an officer, who has attached such estate, does not lose his rights under his mortgage, by stating, in consequence of a mistake in computing interest, an amount less than the amount actually due.

If the mortgagee in such account refer the officer to others for information concerning a portion of the amount due, the account is not therefore insufficient, but, upon a tender of the amount stated in the account, the mortgage, as against the attachment, will be discharged.

Merrimac County.

MOSES D. PERKINS v. STEPHEN PERKINS.

Probate of will — Presumption of sanity.

Every man is presumed to be of sane mind, until the contrary is proved. In the proof of a will, the presumption of sanity is sufficient to support the will, till some evidence to the contrary is offered.

If the attesting witnesses, who must necessarily be called to prove the execution of it, if they are living and within reach of process, do not effectually impeach the testator's sanity; or if their handwriting only is proved; the will must be established, unless proof of insanity is offered by the party opposing the probate.

ALBIN v. LORD.

Trespass — Wife's estate — Tenancy of husband — Construction of statute.

Possession of land, unexplained, is sufficient to enable the possessor to maintain trespass against a wrong doer.

A married woman, holding real estate to her sole and separate use, under the provisions of the statute of 1846, possesses the same rights and powers, and is entitled to the same remedies at law and in equity, in respect to such property, as if she were sole and unmarried, and may rent or lease the same to the husband or any other person.

Where a wife, holding a farm to her sole and separate use, lives upon it with her husband and family, and he is

shown to have occupied, managed, and controlled it for a long series of years, taking the crops, rents, and profits, and disposing of the wood, timber, and other products, as if he were the absolute owner, he must be presumed *prima facie* to have had the rightful and beneficial possession of the farm as her tenant, upon some satisfactory arrangement with her, by parol or otherwise, and is therefore entitled to maintain trespass; if there be no doubt upon the question of the capacity to contract existing, it is for the jury, and not the court, to determine the character of his possession.

STATE v. ARLIN.

Prosecution — Incidents of a penalty.

A prosecution is not pending within the meaning of the act of June 27, 1859, where no indictment has been found, but only preliminary proceedings have been instituted before a magistrate.

Under the former statute, one indicted for robbery, was entitled to counsel, process to compel the attendance of witnesses, and other privileges, as incidents to the punishment by law prescribed for the offence, and the former punishments having been abolished, its incidents fell with it.

WEBBER v. GAGE ET ALS.

Statement of title in equity — When injunction will issue.

It is not essential that the complainant's title to the subject matter of a bill in equity should be directly and explicitly averred; it is sufficient, if it may be fairly inferred from the facts stated.

Where the injury is irreparable, not susceptible of being adequately compensated in damages, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented, as where loss of health, loss of trade, or business, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful acts, or where an easement or servitude is annexed, by grant, covenant, or otherwise, to a private estate, a Court of Equity will interfere by injunction in furtherance of justice and the violated rights of the party, or to protect the due and quiet enjoyment of the easement against encroachments.

STATE *v.* BONNEY.

Indictment — Evidence.

On an indictment for the illegal sale of liquor, and proof of sale by the respondent's servant at the bar of his hotel, it was

Held, that it was competent to prove that the defendant at the same time was engaged in the business of selling liquor at that place, as tending to show that the servant was authorized to make such sale, and that his declarations, made a few days after, that he *had sold* and *should continue the traffic*, were admissible.

OSGOOD *v.* OSGOOD.

Action by surety — Damages.

In an action upon a note given by the principal to a surety to indemnify him for his liability, the measure of damages is the amount paid by the surety at any time before trial; unless he has made such payment, he can recover only nominal damages.

BANK *v.* CLOUGH AND TRUSTEES.

Practice — Trustees' disclosure.

It is within the discretion of the court to allow the plaintiff to withdraw his election to put trustees to answer interrogatories, and to elect to try the question of their liability by the jury, although their disclosures are not completed.

WYMAN *v.* PERKINS.

Evidence — Caption of depositions — Estoppel.

Upon the question whether there had been a breach of a contract by the defendant to pay the plaintiff a certain amount in sawing clapboards out of lumber to be furnished by the plaintiff, a witness having testified that the defendant's agent refused to saw certain logs for the plaintiff, but sawed them for the witness, who paid the agent for the sawing at the time of the transaction, and took his receipt therefor, such receipt is admissible in evidence.

The certificate of a magistrate taking a deposition that the cause of taking was that the deponent lived more than ten miles from the place of trial, is *prima facie* but not conclusive evidence of the distance.

The court will receive evidence upon the question of the distance from the place of trial of the residence of a witness whose deposition is offered, and decide it as a question of the admissibility of evidence.

Where upon a parol agreement to submit all demands to arbitration, one of the parties falsely represents to the other that he has presented all his claims, and the other, acting upon the belief that that representation is true, performs the award, the party making such representation is estopped to recover a claim designedly and fraudulently withheld from the arbitration.

Belknap County.

AVERY ET ALS. v. BOWMAN ET ALS.

Levy—Amendment—Officer's return—Sheriff's—Deceased deputy.

The return of the extent of an execution upon real estate, must expressly state every fact which the statute makes essential to its validity, or every such fact must be necessarily implied in what is stated, else the title will not pass thereby.

Sometimes an application for leave to amend is addressed to the discretion of the court, and its denial is not the subject of exception or review; but when an amendment is refused, not on the ground of discretion, but because the court has no power to grant it, such refusal is error in law, which may be corrected upon exceptions or upon error brought.

An officer will be permitted or directed to amend his return of an extent, in order to perfect the title, according to the justice and truth of the case, where no rights of third persons have intervened, and the evidence is full and satisfactory; and even as against third persons, the return may and will be thus amended, if it contain in itself sufficient matter to show that, in making the levy, all the requisitions of the statute were probably complied with.

Such amendment may be allowed at any time after the return day of the execution, in the discretion of the court to which the execution was returnable and returned.

A public officer, who might have amended a record or return while in office, may make the same amendment after the term of his official duty has expired.

A sheriff may amend the return of his deceased deputy, after as well as before the expiration of his own term of office.

FABYAN v. BURRELL.

Taxation of costs — Judicial notice — Orders — Witnesses' fees.

Upon error to correct a taxation of costs, the court will re-examine the matter and re-tax the costs, by a commissioner, or otherwise, precisely as the court below ought to have taxed them originally; and neither oral nor written evidence will be received to contradict and control the proofs contained in the transcript of the record brought up from the court below.

In taxing bills of costs, courts take judicial notice of the distances and relative situations of the residences of parties and witnesses, the length of terms, the appearance or non-appearance of defendants, the course of proceedings and the state of business before themselves, and inquire into every matter connected with their own record and orders, informing themselves upon these subjects in any mode within their reach, and from any source upon which they are willing to rely.

An order of court seasonably made, that no action, except a designated one, will be tried after a particular day of the term, and that parties will not be allowed to tax for the attendance of witnesses in other actions after that day, precludes the taxation of costs for the subsequent attendance of witnesses in all but the specified action.

Parties will not ordinarily be allowed to tax fees for the travel and attendance of witnesses at trial terms in a subsequent suit for a breach of the covenants of a lease to pay rent, while a prior suit between them for a prior breach of the same covenants, involving precisely the same questions, is pending at the law terms, the decision of which must be conclusive upon the subsequent suit.

BODGE v. FOSS ET ALS.

Division of towns — Exceptions to jurors.

The town of Gilmanton was divided by an act of the Legislature passed June 28, 1859, and two new towns were constructed out of its territory. Said act took effect from its passage, and there was no provision in the act for regu-

lating or administering the affairs of the old town, or the new ones, until the new towns should organize and elect their officers. Whether in such case the old officers did not hold over, and were not authorized to act, until new ones were elected and qualified in the new towns—*quare?*

During the period between the passage of this act, and the organization of said new towns, the old officers acted and jurors were drawn, who attended court, and the acting town clerk seasonably made return of his doings upon the *venire* to said court,—

Held, that an objection for that cause to a juror thus drawn, if not made until after verdict, must be considered as having been waived because not seasonably made.

BARKER v. BARKER.

Right of third persons admitted to defend to appeal.

A party admitted to defend a suit against another, as a subsequent attaching creditor and the like, has, under the law of 1855, remodelling the judiciary, a right to appeal upon giving the usual bonds.

Rockingham County.

HILL ET ALS. v. MCINTIRE ET ALS.

Minor's estate — Trust funds.

The estate of the guardian of a minor being insolvent and his sureties irresponsible, it is not necessary for the ward to institute proceedings at law, before he files a bill in equity to recover such part of the estate as he can trace.

Any person, in whose hands any part of the ward's estate can be found, will be holden as a trustee for the amount, if it can be shown that it came into his possession with notice of the trust.

ROGERS v. ODELL.

Another action pending.

Where a suit is brought here and in another State, for the same cause of action, and a judgment recovered in that State, a suit is brought here upon that judgment, the last writ will not be quashed by reason of the pendency of the former action, because as the actions cannot be supported by the same evidence, they are not technically for the same cause.

BLAKE v. PORTSMOUTH & CONCORD RAILROAD.

Corporations — Construction of statute — Repeal of charter.

By the statutes of New Hampshire, a suit may be maintained by or against any corporation for three years after the expiration of its corporate powers, whether they expire by express limitation, or otherwise.

The word "*may*" in a statute, is to be construed "*must*" or "*shall*," where the public interest or rights are concerned, and the public or third persons have a claim *de jure* that the power should be exercised.

No repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for a previously incurred liability, or affect a pending suit against it.

TRIPE v. MARCY.

Limitations — Mortgage — Betterments.

The possession of the mortgagor will not ordinarily be regarded as adverse, without some unequivocal act hostile to the mortgagee's title and distinctly brought to his knowledge, or the possession become a disseizin by the election of the mortgagor.

In this respect the assignee of the equity of redemption, with notice of the mortgage, stands like the mortgagor, and the registry of the mortgage, being in the line of the assignee's title, is constructive notice to him.

Neither the mortgagor or his assignee, with such constructive notice, can be regarded as holding the land under a supposed legal title, within the meaning of the law relating to betterments.

ROBY v. OSGOOD & REED.

Trespass — Division fences.

Where a horse escapes from the close of A. where he rightfully is, into an adjoining close of B. through the fault of B. in taking down and not replacing a sufficient division fence which A. is bound to maintain, B. is liable in trespass for turning the horse into the highway whereby he is lost.

PHILBRICK *v.* PHILBRICK AND TRUSTEES.

Constitutional law — Trustee process.

A statute is not unconstitutional as impairing the obligation of contracts, which authorizes the signer of a note made in this State and payable to a citizen of another State or order, to be charged generally as the trustee of the payee for the amount due on the note.

PEASLEE *v.* DOANE AND TRUSTEE.

Promissory note — Liability of trustee.

A trustee, who discloses that, at the time of the service of the trustee process upon him, the defendant owed him a debt secured by the pledge of a note given for a sum larger than his debt, which note he has since sold for the amount of his debt, will be charged for the difference between his debt and the amount of the note unless he shows that the sale was made in good faith and for the highest price that could be obtained by reasonable effort.

Strafford County.

HORN APPELLANT *v.* DAVIS AND WIFE.

Homestead exemption and right.

If a husband conveys his homestead without the concurrence of his wife, and subsequently acquires a new homestead, though of less value, the homestead right in the former is thereby terminated.

If a husband conveys an undivided half of the homestead, on which he and his family have lived, to a third person, and his wife does not join in the deed, but the grantee enters into possession of his part, and the husband continues to occupy the residue in common as his homestead, the homestead right becomes limited to the half so occupied.

The judge of probate has no authority to assign to a widow her homestead, except in the estate of which the husband died seized, or where there is no dispute about the title.

DEMERRITT *v.* MESERVE.

Agent — Res gestæ.

The admissions of a special agent are not competent evidence against the principal, unless upon some point

within the scope of his authority, and made while the matter was depending.

HALL v. SELECTMEN OF SOMERSWORTH.

Teachers' institutes — School commissioner — Mandamus.

The duty of towns to appropriate and pay, for the support of Teachers' Institutes, a sum equal to two per cent. of the amount required by law to be raised for the maintenance of schools, is imperative, and if neglected, a mandamus will issue to enforce its performance and compel the payment of the money by the selectmen to the school commissioner of the county.

DROWN v. FOSS.

Execution — Rights of creditor under levy — Trespass.

An execution creditor who cut hay upon land of which he was in possession under a levy of his execution within a year from the return day of his execution and before payment of the sum at which the land was appraised and interest, and before he conveyed his interest in the land, is not liable in trespass *qu. cl.* for remaining in possession or removing the hay while in possession after such payment and conveyance.

Carroll County.

WILLARD v. BICKFORD.

Award.

Three actions of slander, brought by one plaintiff against several defendants for a similar cause, were separately submitted to the same arbitrators. The hearings were had at one sitting, and the arbitrators by a single instrument, awarded that the plaintiff recover of the defendants fifty dollars each, and five dollars each as costs. It was —

Held, that the award was sufficient.

The submission provided that the award should be made and ready to be delivered to the parties in ninety days. It was —

Held, that if the award is ready to be delivered to the prevailing party on payment of the arbitrator's fees within the time, it is within the provision of the submission.

ORDIORNE v. WOODMAN.

Set off — On endorsed notes — Of partnership claims.

In an action by an endorsee against the maker of a negotiable note, the latter may set off a claim against the endorsee, if it appears that the note was endorsed after it was discredited, unless it is shown by the holder, that he took the note *bona fide*, and for a valuable consideration.

As no action can be brought by one partner against his co-partner, upon any partnership transaction, unless there has been a settlement of the whole concern, or of the claim in question, and a promise of payment, the unsettled dealings of either partner with the firm, cannot be set off in an action at law by one partner against the other.

RUSSELL v. DYER.

Amendments — When final.

It is a mere matter of course to order a cause to be brought forward on the docket, where either party desires to be heard on any motion in respect to it.

A motion to amend may relate to some proceeding in a cause, and in such a case, it is in its nature interlocutory, and the discretion exercised by the court, will not be revised, unless an exception is reserved by the judge.

But a motion, or petition for an amendment, may have no relation to the proceedings in any pending cause. It may be in the nature of a suit, or action by one party against another, to obtain an order for the amendment of a record, where such amendment may affect the title of one, or both the parties. In such case the order is in the nature of a judgment. Exceptions may be taken as of right to the decision, and the judgment revised by the court above. The order made is final, and the case will not be re-heard, except upon the like grounds and in the like cases, as the ordinary judgments of the court.

An amendment of a levy, having been made at one term after notice and a full hearing of the parties, and no exception taken; a motion at a subsequent term, to rescind the order, and erase the amendment, upon a suggestion that they were made upon false testimony, will not be heard.

In such case a new trial may be granted under the statute, where the facts will sustain the application.

Cheshire County.

ROBINSON v. HOLT.

Fraudulent conveyances — Officer — Confusion of goods.

By the statute of 13 Elizabeth, chap. 5, made perpetual by 29 Elizabeth, chap. 5, and adopted as part of the common law in New Hampshire, all conveyances made to delay, hinder or defraud creditors, are fraudulent and void as to those creditors.

He who purchases or takes a mortgage of property, with knowledge of the fraudulent design of the vendor or mortgagor, thereby to defeat or delay his creditors, is in law charged with a participation in the fraud, although he may pay a full consideration and take immediate possession; the transaction is *mala fide*, and the conveyance, or mortgage to him, is utterly void and of no effect, as to such creditors.

Where one permits his goods to be so intermingled with those of a debtor, that an officer having a writ or execution against such debtor, after making reasonable inquiry and effort is unable to distinguish the one from the other, and he does not himself identify and point them out, the officer is justified in taking and selling the whole as the property of the debtor.

If goods of several intermingled can be easily distinguished and separated, or if they are of the same nature and value, so that a division of equal proportionate value can be made, although incapable of an actual separation by the identification of each particular, each may lay claim to his own, or to an aliquot part; but, if the mixture is undistinguishable, and a new ingredient is formed not capable of a just appreciation and division according to the original rights of each, or the articles mixed are of different values or quantities, and the original values or quantities cannot be distinguished, the party who occasions, or through whose fault or neglect occurs the wrongful mixture, must bear the whole loss.

CHAPIN v. SULLIVAN RAILROAD.

*Farm crossings — Cattle guards — Damages to cattle—
Stone excavated.*

Railroads are bound to construct and maintain sufficient cattle guards at all farm crossings of their track, and are

responsible for all damages resulting from their neglect of duty in this respect to cattle rightfully upon the crossing.

Railroads are not obliged to maintain either fences or cattle guards against cattle wrongfully upon the public highways, and are not responsible for injury to cattle wrongfully on the highway and from thence escaping upon their tracks.

Stone, excavated in constructing a branch railroad through a man's land under a permissive license from him to construct and use the track thereon and hold the same so long as it shall be used for railroad purposes, remains the property of the land owner, and if not used in the construction of the branch track, cannot be removed without his permission and devoted to other purposes.

It seems that where land is taken for a railroad by the appraisal of the commissioners and selectmen, the corporation are entitled to employ the whole or any portion of the earth, stone, and gravel excavated on one portion of the line, in the proper construction of any other portion thereof.

WOOD, ADM'R v. STONE, ADM'R.

Distribution of estates — Authority of probate courts.

It is the duty of the judge of probate to decree the distribution of the personal estate of deceased persons, remaining in the hands of administrators on settlement of their accounts of administration, to the persons designated by law as entitled to receive the same.

Where there is a controversy as to the validity of an assignment made by one of the persons thus designated, who has since deceased, his duty and authority are limited to ascertaining who may be the legal representative of such deceased person, and decreeing the share belonging to him to be paid to such representative; nor is it any part of his duty, nor has he any rightful authority, to investigate and determine the validity of such contested assignment.

Courts of probate are of limited and special jurisdiction; they have no jury; their proceedings are not according to the course of the common law, and the legislature do not seem ever to have contemplated investing them with general common law powers, as judicial tribunals, to adjudicate and determine controverted questions of fact or of law.

RENY ET ALS. v. ARMSTRONG.

Note — Extension of time — Discharge of endorser.

The liability of an accommodation endorser is not affected by the makers' transferring the note directly to their creditor in payment of their debt, instead of obtaining the money to be used in their business by a discount at a bank, as was the original purpose.

A composition deed, by which the plaintiffs, to whom the note in question was transferred, agree to receive a certain per cent. of all debts due from the makers of the note, in full discharge of the same, to be paid at a time beyond the maturity of the note, operates as an extension at the time of payment, and discharges the endorser.

Proof of a parol agreement made at the execution of such composition deed, that it should not embrace the note, is inadmissible, upon the ground that it contradicts the written instrument, and also, that such an agreement would be a fraud upon the other creditors, and void.

KNIGHTS v. FOSTER.

Slander — Malice — Damages.

In an action for slander, the defendant cannot, under the general issue, prove that the words spoken were but a repetition of common reports, either to rebut malice or to mitigate damages; nor can he, for either purpose, prove the truth of the words spoken.

Neither will he be allowed for either purpose to prove acts of the plaintiff tending to excite suspicions that the plaintiff was guilty of the crime charged, but stopping short of actual proof of such guilt.

Therefore, where the defendant offered proof of improper acts and conduct of the plaintiff calculated to invite such remarks as were made by the defendant, and to afford just grounds to believe them to be true, —

Held, that such evidence was rightly rejected, although it was proposed to show that, at the time the words were uttered, a public investigation was going on involving an inquiry into the plaintiff's conduct and was a subject of public remark.

When actual malice is shown, the jury may award exemplary damages.

COOK v. COMBS.

Written contract — Parol evidence.

In assumpsit brought to recover part of the price paid for land conveyed by deed, parol evidence that the purchaser paid a certain price per acre, and that the vendor warranted the quantity of the land, is inadmissible as tending to vary the terms of the deed.

Sullivan County.

BARSTOW v. SPRAGUE.

Trespass — Foreign wills — Copies — Special verdict.

Actual possession alone, is sufficient to enable the possessor to maintain trespass *quare clausum*, against one who subsequently enters without title, or authority from one who has title.

By the statute of New Hampshire, the probate of a will is conclusive as to its execution as relates to both real and personal estate, but no will is effectual to pass the title to either, unless it has been duly proved and allowed in some probate court of the State, or something equivalent to such approval and allowance has taken place.

To make a copy of a foreign will and its probate competent evidence of title to real estate in New Hampshire, the will must have been proved before some probate court in the State, or a duly authenticated copy of the will and its probate elsewhere, must have been filed and recorded in some probate office here, upon application in writing for that purpose, after due notice, pursuant to a decree of the judge of probate to that effect.

The court, against the objection of either or both parties, may properly instruct a jury to return, together with a general verdict, answers to specific questions submitted to them.

BLODGETT v. JACKSON ET ALS.

Promissory note — Fictitious payee — Endorsement.

After the signatures to a promissory note have been proved, such note may be read in evidence, not only to show the terms of the contract which the defendants made, but also to show the party or parties with whom it was made, and

if a note be made payable to a firm, the note itself is competent evidence after proof of defendants' signatures to it, of the existence of such firm, as against such defendants.

A note was made payable to Whitney, Shaw, Lent, and Howes, and endorsed to plaintiff. On trial the signatures and endorsement were denied, and after proof of defendants' signatures to the note, plaintiff proved that upon the day of the date of the note a man calling himself Lent, and as one of the firm aforesaid, sold the same to the plaintiff, and endorsed it in the name of said firm.

Held, that in the absence of all other evidence upon the point, possession of the note was competent evidence of ownership, and of the identity of the person selling and endorsing the note, with the Lent to whom with others the note was payable.

Where a note is made payable to a firm and no such firm exists, the person to whom such note was given may assume such firm name, and endorse said note in the name of such firm, and it will be a good endorsement in the hands of an innocent holder, who may collect the same of the makers under a count for money had and received.

PIKE v. CLARK ET ALS.

Deed of married woman — Sale of equity of redemption.

On a conveyance of land to a married woman, and a mortgage back by her, to secure the payment of the price, it was —

Held, that such mortgage was absolutely void and inoperative, and that a creditor of the wife acquired no interest in the land, by a sale at auction of an equity of redemption upon his execution.

CARLTON v. CARLTON.

Wills — Attesting witness — Competency.

A person competent to be sworn and to testify in a court of justice is a competent attesting witness of a will.

The competency of an attesting witness is a question concerning the execution of the will.

A person under fourteen years of age is presumed to have been incompetent, from defect of understanding, to attest the execution of a will, but that presumption may be rebutted.

Grafton County.

BETHLEHEM *v.* ANNIS.

Mortgage — What is not.

A deed upon condition is not a mortgage, unless it is a security for a debt, or a demand in nature of a debt. If the demand, on breach of a condition, would be for unliquidated damages, it is not a mortgage.

Courts of equity may nevertheless relieve from the forfeiture of such conditions, as in case of other penalties, such relief being adapted to the nature of each case.

A deed, conditioned for the support of a person in old age, is not a mortgage; and the interest of neither party is assignable without consent of the other.

No action at law can be maintained by an assignee of the grantor in such case, unless perhaps where there has been a breach of condition, and an actual entry for condition broken, before the assignment.

HAYDOCK *v.* DUNCAN.

Bond on appeal.

A bond upon an appeal, executed by the attorney in court of the appellant, was objected to, because the attorney was not authorized by deed to execute it. It was formally ratified by the appellant under seal. It was —

Held, the bond thus ratified was sufficient, and the appeal was sustained.

PAGE *v.* PARKER ET ALS.

Experts — Hearsay — Conspiracy — Leading question — Immaterial evidence — Nonsuit — Damages.

Upon questions of skill or science, men who have made the subject matter of inquiry the object of their particular attention or study, may give their opinions in evidence, it being first shown that they are skilful or scientific, or at least that they have superior actual skill or scientific knowledge; mere opportunity for observation is not sufficient.

Hearsay evidence is incompetent to establish any specific fact, which is in its nature susceptible of being proved by witnesses who can speak from their own knowledge.

Where several persons are proved to have combined together for the same illegal and fraudulent purpose, any act done by one of the party in pursuance of the original concerted plan and with reference to the common object, is, in contemplation of law, the act of all, and any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, in furtherance of the common design, and so part of the *res gestæ*, which are brought home to one conspirator, are evidence against the others, if it sufficiently appear that they were made and used in furtherance of the common purposes of the conspiracy; but it is essential that the conspiracy and common design be proved.

A question is leading which instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, or plainly suggests the answer which the party desires to obtain from him, whether it be put in the alternative form or not.

The admission of evidence wholly immaterial furnishes no cause for setting aside a verdict.

Case for deceit in the nature of conspiracy cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone.

Such action can only be sustained where some affirmation or representation wilfully false, or some designed and positively fraudulent artifice, is directly proved, or necessarily to be presumed from the circumstances attending the transaction itself, to have been made or perpetrated by the defendants jointly, by means whereof a damage resulted to the plaintiff.

A paper prepared by one witness, after the occurrences to which its contents relate, cannot be permitted to go to the jury, with his testimony, as substantive evidence, for the purpose of confirming it, and impeaching the testimony of another witness upon the same subject.

The proper measure of damages in action for fraud and deceit in the sale of property, where the purchaser retains it, is the difference between the actual value thereof, and its value as it was represented to be at the time of the sale; the price paid, being very strong, but not conclusive evidence of its value as represented.

WILSON v. MARTIN.

Lien asserted — Possession — Trespass.

As a general rule, every bailee for hire, who by his labor and skill has imparted an additional value to the goods of another, has a lien, at his election, upon the property, for his reasonable charges in relation to it, so long as he retains the same in his custody.

The gist of trespass being an injury to the plaintiff's possession, while property remains in the possession of a bailee, who is entitled to, has asserted, and still maintains his lien thereon, the general owner cannot sustain trespass therefor.

HOLTON v. HOLTON & CARPENTER, TRUSTEES.

Partner — Separate creditors — Separate estate.

Separate creditors of an individual partner, have a preference over the separate estate of their debtor for the satisfaction of their debts, until it has been actually applied in payment of partnership debts, and any executory attempt by sale or otherwise, with notice, to divert the separate property or funds of the individual debtor, from the payment of his separate debts, to the discharge of a partnership liability of the firm, is in principle a fraud on the rights of a creditor of the individual debtor, and void as to him.

RAND v. WHITE MTS. RAILROAD AND NESMITH, TR.

Executory contract — Damages — Liability of trustee.

The measure of damages in a suit for the breach of an executory contract to purchase railroad stock, is the difference between the value of the stock at the agreed price, and its actual or market value at the date of the breach of the contract.

Such difference is a matter of unliquidated damages, to be ascertained by the verdict of a jury, or the finding of some other competent tribunal, and therefore not the subject of attachment in trustee process.

HURLBURT ET ALS., APPELLANTS, v. WHEELER, APPELLEE.

Probate appeal — Property not inventoried — Delivery of deeds — Declarations.

The decision of the judge of probate, in all matters not strictly interlocutory, is final and conclusive, unless vacated by an appeal therefrom.

The proper time and place, to charge an administrator with property belonging to an estate not inventoried or accounted for, are, in the probate court, on the settlement of his administration account.

The question whether or not a debt was delivered, although sometimes of a mixed character, partly of law, and partly of fact, is generally one of fact only.

The declarations of an ancestor in relation to his ownership or transfer of property claimed by his heirs, are competent evidence against them, if made against his interest, while he was in possession of all the rights and interest in the property which his heirs set up a claim for under him.

HATCH v. HART.

Lease — Reservation of crops — Abandonment.

Where, in a lease of real estate, there is a reservation of a portion of the crops to be raised upon the land, the general property and right to them remain in the landlord, the tenant acquiring neither the ownership nor right to sell the same; but while the tenant retains possession of them under the lease, he has such an interest as makes him a tenant in common, and he must join with the landlord in an action for an injury to them.

If, however, the tenant abandon the possession of the crops under the lease, or if he assent to a sale of his interest therein, and relinquish further claim thereto, the landlord may alone maintain trespass for an injury to the crops thus abandoned, or sold with the assent of the tenant.

DEXTER v. YOUNG.

References under rule of court.

When parties to an action pending in court enter into an agreement to submit the action to one or more referees, and upon such submission a rule of reference is entered by the court, neither party has the right to revoke such submission, or to rescind such rule of reference.

But upon the motion of either party and for good cause shown, the court upon a hearing will rescind the rule.

The court may also rescind the rule for good cause appearing to the court, even though neither party requests it.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1859.	Returned by
Badger, Wm. F.	Milton,	November 3,	George White.
Bartlett, Charles O. (1)	Natick,	" 18,	Wm. A. Richardson.
Caneday, Charles E. (2)	Boston,	" 18,	Isaac Ames.
Carney, Michael,	Worcester,	" 29,	Henry Chapin.
Couch, Stephen C.	Holyoke,	" 26,	John Wells.
Dean, Jarvis W.	Roxbury,	" 25,	George White.
Doyle, Thomas	Greenfield,	" 10,	Charles Mattoon.
Dutton, Rollin H.	Adams,	" 15,	James F. Robinson.
Fleming, Edwin (3)	Boston,	" 1,	Isaac Ames.
Forward, Joseph M.	Southwick,	" 12,	John Wells.
Frost, Seth F.	Brighton,	" 2,	Wm. A. Richardson.
Goodell, James	Chelsea,	" 30,	Isaac Ames.
Goodnow, Wm. D. (4)	Boston,	" 22,	"
Gould, Alonzo (1)	Natick,	" 18,	Wm. A. Richardson.
Griffin, John	Boston,	" 9,	Isaac Ames.
Hamilton, Thomas	Charlestown,	" 2,	Wm. A. Richardson.
Hanford, Jesse	Westboro',	" 2,	Henry Chapin.
Haskell, Alfred (3)	Boston,	" 1,	Isaac Ames.
Hinckley, Holmes	"	" 14,	"
Holt, Charles S. (5)	"	" 30,	"
Howe, Benj. B.	Roxbury,	" 3,	George White.
Jones, Frederic G.	North Bridgewater,	" 12,	William H. Wood.
Kenney, Edward	Roxbury,	" 21,	George White.
Lally, Michael	"	" 15,	"
Lawton Joseph B.	"	" 22,	"
Leonard, Ezra	Chelsea,	" 16,	Isaac Ames.
Lewis, Geo. W.	Groton,	" 14,	Wm. A. Richardson.
Mansfield, John (4)	Boston,	" 22,	Isaac Ames.
Matthews, Wm. H. (6)	Chelsea,	" 14,	"
Mills, Edward A.	Boston,	" 16,	"
Morse, Albert	"	" 14,	"
Nichols, Isaac	Roxbury,	" 15,	George White.
Noyes, James	Boston,	" 18,	Isaac Ames.
Onion, Newell F.	Hopkinton,	" 12,	Wm. A. Richardson.
Pond, John F.	Worcester,	" 25,	Henry Chapin.
Rogers, Oliver C.	Woburn,	" 29,	Wm. A. Richardson.
Rollins, Benj. F. (2)	Boston,	" 18,	Isaac Ames.
Rose, Jacob	Springfield,	" 28,	John Wells.
Shannon, Henry F. (6)	Chelsea,	" 14,	Isaac Ames.
Soule, Simeon	Duxbury,	" 15,	Wm. H. Wood.
Stockbridge, Wales R. (5)	Cambridge,	" 30,	Isaac Ames.
Stone, Nehemiah H.	Boston,	" 22,	"
Sweet, Horatio N.	Lancaster,	" 23,	Henry Chapin.
Thayer, Geo. W.	Springfield,	" 16,	John Wells.
Torrey, Orson S.	Chesterfield,	" 18,	Samuel F. Lyman.
White, Benj. F.	Cambridge,	" 5,	Wm. A. Richardson.
Whitney, Joseph	Waltham,	" 30,	"

FIRMS.

- (1) Gould & Bartlett.
- (2) Caneday, Rollins, & Co.
- (3) Fleming & Haskell.
- (4) John Mansfield & Co.
- (5) Holt & Co.
- (6) William H. Matthews & Co.